

# THE YALE LAW JOURNAL

DEREK JINKS AND NEAL KUMAR KATYAL

## Disregarding Foreign Relations Law

**ABSTRACT.** What deference is due the executive in foreign relations? Given the considerable constitutional authority and institutional virtues of the executive in this realm, some judicial deference is almost certainly appropriate. Indeed, courts currently defer to the executive in a large number of cases. Eric Posner and Cass Sunstein nevertheless call for a dramatic expansion in the deference that courts accord executive interpretations of law in the foreign affairs context. They maintain that courts should presumptively give *Chevron*-style deference to executive interpretations of foreign relations law—even if the executive interpretation is articulated only as a litigation position, and even if it violates international law. In our view, substantial deference to the executive is singularly inappropriate in a large swath of cases eligible for *Chevron* deference under their proposal—namely, those involving foreign relations law that operates in what we call the “executive-constraining zone.” Courts have scrutinized, and should continue to scrutinize, executive interpretations of international law that has the status of supreme federal law, that is made at least in part outside the executive, and that conditions the exercise of executive power. Failure to do so would undermine the rule of law in the foreign relations context. It would also dramatically increase the power of the President in ways that would subvert the nation’s interests, discourage the executive from developing important internal checks on presidential power, and lead to less congressional regulation of the executive. In short, we maintain that deference at some point invites disregard and that law-interpreting authority at some point effectively constitutes lawbreaking authority.

**AUTHORS.** Derek Jinks is Assistant Professor of Law, University of Texas School of Law. Neal Kumar Katyal is Professor of Law, Georgetown University Law Center. For helpful comments, the authors wish to thank Judy Coleman, Ryan Goodman, Larry Sager, David Sloss, Scott Sullivan, and Carlos Vázquez. Thanks also to Eric Posner and Cass Sunstein for what has proven to be a spirited and thought-provoking exchange.



## ARTICLE CONTENTS

INTRODUCTION	1232
I. OUR VIEW: MAKING, BREAKING, AND INTERPRETING LAW IN THE "EXECUTIVE-CONSTRAINING ZONE"	1236
II. UNDERSTANDING THE STRENGTH (OR LACK THEREOF) OF DEFERENCE CLAIMS	1245
III. THE CASE AGAINST POSNER AND SUNSTEIN'S PROPOSAL TO PROVIDE DEFERENCE IN THE EXECUTIVE-CONSTRAINING ZONE	1249
A. Evaluating the Affirmative Case for Deference	1249
B. Boundary Problems	1257
C. Excessive Concentration of Power in the Executive	1262
D. The Withering of Congress's Role	1275
E. One Precondition to Deference: Bureaucratic Expertise	1279
CONCLUSION	1282

## INTRODUCTION

What role should courts play in the interpretation and application of foreign relations law? One important aspect of this question is whether and when courts should second-guess the executive on matters that implicate foreign relations. This issue is as difficult as it is important. On the one hand, the executive has both unique institutional virtues and substantial constitutional authority when it comes to foreign affairs. On the other hand, this sphere of government activity is increasingly governed by law—law that both purports to regulate the actions of the executive and that is made at least in part outside the executive. The upshot is that although some deference is almost certainly often warranted, too much deference risks precluding effective regulation of executive action.

Eric Posner and Cass Sunstein call for a dramatic expansion in the deference that courts accord executive interpretations of law in the foreign affairs context.<sup>1</sup> They maintain that courts should defer to the executive in a broad class of cases, even if the executive interpretation is articulated only as a litigation position and even if the executive's interpretation is inconsistent with international law.<sup>2</sup> Of course, courts do, in fact, often defer to the executive in foreign affairs cases.<sup>3</sup> Nevertheless, Posner and Sunstein urge that even greater deference is required.<sup>4</sup> In their view, the proper scope of deference is limited only by a narrow range of underspecified nondelegation canons and a "reasonableness" inquiry analogous to that articulated in the line of administrative deference cases starting with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>5</sup> Although *Chevron*-style deference formally preserves some role for the judiciary to review executive interpretations for

- 
1. See Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007).
  2. See *id.* at 1204-07. Indeed, Posner and Sunstein favor an expansion of the executive's authority to *violate* international law—presumably even when such law is part of the supreme law of the land.
  3. See *infra* text accompanying notes 14-24.
  4. Indeed, they suggest that courts should defer to the executive not only in the class of cases in which these existing doctrines properly apply, but also on the question of whether these deferential doctrines should apply to a specific case in the first place. See, e.g., Posner & Sunstein, *supra* note 1, at 1204-07.
  5. 467 U.S. 837 (1984).

their “reasonableness,” courts conducting such review rarely invalidate agency action.<sup>6</sup> Despite this fact, Posner and Sunstein insist that

[r]eview of executive interpretations for reasonableness nonetheless should be expected to have a significant function. It would, for example, raise questions about apparently arbitrary differences across time or across nations, as in an executive judgment that the civil rights statutes apply in England and Germany but not in France and Italy; any such judgment would have to be explained.<sup>7</sup>

These claims, though, are difficult to square with the very reasons why, in their view, *Chevron* deference is appropriate in foreign relations law in the first place. As we explain more fully below, Posner and Sunstein claim that robust deference is appropriate in the foreign relations realm precisely because the application of this law almost always turns on case-specific judgments of prediction and value—judgments that the flexible, energetic, and accountable executive is well suited to make.<sup>8</sup> The upshot is that *Chevron*-style deference of the sort they propose would radically expand the authority of the executive to interpret and, in effect, to break foreign relations law.

We disagree with their approach. We believe that it would have been a bad idea at the Founding and is an even worse idea today. We are motivated to respond to Posner and Sunstein not simply because of the increasing importance of this issue in the wake of the treacherous attacks of September 11, 2001, but also because we fear that the innovative proposal by these accomplished academics may lead courts down a path that would depart from longstanding precedent at a crucial moment in the development of international law, particularly international humanitarian law.

Posner and Sunstein are absolutely right to acknowledge that their theory has “radical implications.”<sup>9</sup> If enacted into law, it would upend centuries of precedent and give the President a power that no court has ever given the

---

6. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) (finding that a very small percentage of cases invalidate agency decisions as unreasonable).

7. Posner & Sunstein, *supra* note 1, at 1198 n.90.

8. See *id.* at 1204–12. To clear the “reasonableness” hurdle envisioned by Posner and Sunstein, the executive would need only to suggest that the seemingly arbitrary application of foreign relations law was guided by judgments of prediction and value—simply indicating with respect to any treaty obligation that, perhaps, some countries were more likely to reciprocate, or that cooperation with some other countries, even if fully realized, offered little material benefit to the United States.

9. *Id.* at 1177.

executive. It would accelerate the trend of circumventing Congress in key decisions involving war powers and civil liberties and would be in tension with the separation of powers our Founders laced into the Constitution. While such a claim might be temporarily plausible in emergency situations in which Congress cannot act, and in others in which there are strong executive branch processes that have done the hard work of earning deference, they are not appropriate in all situations.

In our view, Posner and Sunstein's proposal threatens to undermine the rule of law by radically increasing the executive branch's capacity to interpret and to break the law under its foreign relations power—even when the law's purpose is to restrict that very power. Our position is straightforward: we maintain that increased judicial deference to the executive in the foreign relations domain is inappropriate. Two broad claims structure our defense of this view and our critique of the Posner and Sunstein proposal. First, current deference doctrines, some peculiar to foreign relations law and some not, cover the vast majority of examples in which deference is warranted. The burden that Posner and Sunstein must carry is to demonstrate convincingly that their proposal prescribes judicial deference in circumstances not otherwise eligible for robust deference. The circumstances in which their proposal does so include, most prominently, executive interpretations of international law that operate in what we call the "executive-constraining zone." This zone refers to the domain of foreign relations law, particularly international law, that (1) has the status of supreme federal law, (2) is made at least in part outside the executive, and (3) conditions the exercise of executive power.

Our second claim, broadly conceived for the moment, is that substantial judicial deference to executive interpretations of international law is inappropriate, at a minimum, in the executive-constraining zone. International law operating in this zone includes self-executing treaties and statutes incorporating international law either explicitly, as in the case of the Uniform Code of Military Justice (UCMJ) provisions central to the Supreme Court's decision in *Hamdan v. Rumsfeld*,<sup>10</sup> or implicitly, as in the case of the 2001

---

10. 126 S. Ct. 2749 (2006). In *Hamdan*, the Court held that the President lacked authority to proceed with trials by military commissions as contemplated in then-existing military regulations. The Court concluded that no act of Congress expressly authorized the President to employ commissions as then constituted. The Court noted that the UCMJ provision authorizing trials by military commission explicitly does so only to the extent permitted by the law of war. The contemplated commissions were inconsistent with at least one applicable aspect of the international law of war—Common Article 3 of the 1949 Geneva Conventions. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].

Authorization for Use of Military Force (AUMF).<sup>11</sup> Substantial deference in this context cannot be squared with the doctrinal and institutional implications that necessarily follow from the status of these international instruments as “law.” In our view, the courts must retain the institutional prerogative to interpret law in this zone any time cases or controversies turning on the interpretation of this law are otherwise properly presented and otherwise appropriate for judicial resolution. And this prerogative constitutes an important limit on the power of the President to interpret treaties in the course of performing or otherwise implementing U.S. treaty obligations.

Our argument unfolds as follows. In Parts I and II, we define the realm of foreign relations law in which we consider substantial deference plainly inappropriate—the executive-constraining zone. We identify several doctrinal and institutional complications that arise if substantial, case-specific deference is accorded in this zone. Our position is best understood as a broad defense of the existing robust interpretive authority of Congress and the courts in this zone of foreign relations law. In Part III, we identify several specific problems with the Posner and Sunstein proposal. We first argue that Posner and Sunstein offer no good reason to depart from the current longstanding tradition of requiring Congress to authorize explicitly any action in violation of international law that has the status of supreme federal law and conditions the exercise of executive power. We also note that their proposal rests on an unclear and inaccurate conception of foreign relations law—and that this conception generates a host of boundary problems. In addition, we explain that the Posner and Sunstein proposal would dramatically increase the power of the President in ways that would be contrary to the nation’s interests. Furthermore, we suggest that their proposal would, *ex ante*, lead to far less congressional regulation of the executive. Every time Congress authorized force, for example, legislators would now have to fear that their authorization would be viewed as a mandate to pursue any number of other activities that violated international law. Finally, we point out that Posner and Sunstein’s legal claims would encourage courts to defer to self-interested positions taken by the executive when those positions have not been established through ordinary processes and interagency vetting—both necessary to cultivate the

---

11. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. 2002)); *see, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 518-22 (2004) (plurality opinion) (holding that the AUMF implicitly incorporates aspects of the international law of war); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (arguing that the AUMF should be interpreted as implicitly incorporating several aspects of the international law of war).

kind of accountable bureaucratic expertise that is a prerequisite to the deference Posner and Sunstein envision.<sup>12</sup>

**I. OUR VIEW: MAKING, BREAKING, AND INTERPRETING LAW IN THE “EXECUTIVE-CONSTRAINING ZONE”**

We question whether there is a need to increase the deference accorded to the executive in the foreign affairs context. We first note that the executive enjoys substantial discretion in this context—and that courts typically play only a modest role. The sharp edge of the Posner and Sunstein proposal is their recommendation of substantial deference in an even broader set of circumstances. We maintain that courts should, at a minimum, continue to scrutinize executive interpretations of international law when that international law has the status of supreme federal law; is made, at least in part, outside the executive branch; and conditions the exercise of executive power.<sup>13</sup> When international law operates in that “executive-constraining zone,” we believe substantial deference by courts to the executive is inappropriate.

At present, courts are likely to second-guess foreign affairs determinations of the executive in only a narrow range of circumstances.<sup>14</sup> The courts defer to foreign policy judgments of the executive when these judgments are relevant to

- 
12. We therefore take issue with Posner and Sunstein’s characterization of our argument as being motivated by the “narrow frame” of the Bush Administration’s post-9/11 policies. Posner & Sunstein, *supra* note 1, at 1200. Indeed, when viewed against Curtis Bradley’s excellent article on the same subject, Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 679 (2000), the innovation in their piece is—as they themselves partially admit—a post-9/11 perspective, *see* Posner & Sunstein, *supra* note 1, at 1177 n.14. We believe that these very developments highlight the need for greater attention to international law, and a greater awareness that short-term executives may set out to break international law in ways that may harm the nation’s long-term interests. The bulk of Posner and Sunstein’s non-9/11 analysis is simply not that controversial in light of Bradley’s excellent piece, and so we do not take issue with it here. But the rubber hits the road on their claim that the executive should be able to break international law, including international law codified in treaties ratified by a supermajority of the United States Senate.
13. We do not address whether even less deference is appropriate. Our claim is only that substantial deference is inappropriate in a large class of foreign relations cases—and, as a consequence, a large class of cases covered by Posner and Sunstein’s proposal. For more sweeping critiques of judicial deference in foreign affairs, *see* THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); and HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 134-49 (1990).
14. *See, e.g.*, Bradley, *supra* note 12, at 659 (“Since early in the nation’s history, courts have been reluctant to contradict the executive branch in its conduct of foreign relations.”).

the application of important separation of powers rules—such as the act of state doctrine.<sup>15</sup> Many cases touching upon foreign affairs are dismissed under the political question doctrine.<sup>16</sup> This type of deference extends not only to cases that turn on a nonjusticiable issue,<sup>17</sup> but also to cases in which courts accept the executive's determination of an issue as legally binding.<sup>18</sup> In addition, the executive enjoys substantial deference with respect to matters that fall within its exclusive lawmaking authority.<sup>19</sup> For example, the courts defer to executive determinations about the immunity of foreign heads of state from

- 
15. See, e.g., *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (deferring to the executive's policy determination that the act of state doctrine should not apply). Courts have sharply limited the reach of this deference, however. See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (rejecting judicial deference to the executive's legal determination regarding the doctrine's applicability); *id.* at 773 (Douglas, J., concurring) (stating that the *Bernstein* exception would make the Court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others"); *id.* (Powell, J., concurring) ("I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction.").
  16. The broad applicability of the doctrine in the foreign relations context is often asserted in unequivocal terms. See, e.g., *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."). Although such sweeping statements accurately reflect the important role of the doctrine in foreign relations, they inaccurately suggest that there is no meaningful role for the judiciary in this domain. See *Baker v. Carr*, 369 U.S. 186, 211-12 (1962) ("There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." (citing *Oetjen*, 246 U.S. at 302)).
  17. See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (expressing the view that the President's constitutional authority to terminate a treaty was a nonjusticiable political question).
  18. See Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 610-12 (1976) (explaining the analytical distinction, and collecting cases). As Henkin has pointed out, courts characterize some foreign relations issues as "political questions" not because courts are somehow ill equipped to resolve the matter, but rather because "the President's decision was within his [exclusive constitutional] authority and therefore law for the courts." *Id.* at 612; see also Bradley, *supra* note 12, at 660 (invoking the example of whether, after a change of conditions, a foreign nation continues to remain a party to a treaty).
  19. See generally LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 54-61 (2d ed. 1996) (explaining that courts recognize that the executive enjoys some independent "legislative" authority in the foreign relations context and that courts defer to determinations made pursuant to this authority).



suit in the United States<sup>20</sup> and the recognition or nonrecognition of a foreign state.<sup>21</sup> The courts also defer to the executive's determination of a broad range of what Curtis Bradley has called "international facts."<sup>22</sup> For example, courts typically defer to executive determinations of the foreign affairs interests of the United States.<sup>23</sup> However these types of deference are characterized, the important point for our purposes is that many foreign affairs issues are not amenable to judicial resolution—and many determinations of the executive are accepted by the courts as conclusive. In addition, some executive action in the foreign affairs context is entitled to *Chevron* deference, as the doctrine is currently conceived.<sup>24</sup>

Therefore, the only cases in which the Posner and Sunstein proposal would do work are cases in which the issue presented: (1) is amenable to meaningful and effective judicial resolution; (2) is not resolved by an instance of executive lawmaking pursuant to its exclusive authority; (3) does not turn on any "international fact" conclusively determined, or only capable of assessment, by the executive; and (4) is not eligible for *Chevron* deference under current doctrine.

The remaining population of cases includes many in which deference is, in our view, wildly inappropriate. Most importantly, Posner and Sunstein recommend substantial judicial deference to the executive's interpretation of international law—indeed, they expressly favor expanding the international lawbreaking authority of the executive. As they make plain: "[T]he executive

---

20. See, e.g., *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex parte Republic of Peru*, 318 U.S. 578 (1943). The role of the executive has been limited in this domain by the Foreign Sovereign Immunities Act (FSIA) of 1976. 28 U.S.C. §§ 1330, 1602-1611 (2000); see also H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605-06; S. REP. NO. 94-1310, at 9 (1976) (noting that a "principal purpose" of the statute was "to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process").

21. See, e.g., *Guar. Trust Co. v. United States*, 304 U.S. 126, 137-40 (1938). The recognition power is incident to the President's constitutional power to appoint and receive ambassadors. See U.S. CONST. art. II, §§ 2-3; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (1987) ("[T]he President has exclusive authority to recognize or not to recognize a foreign state or government . . .").

22. Bradley, *supra* note 12, at 661-62.

23. See, e.g., *Dep't of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988) (deferring to the executive branch's "[p]redictive judgment" in not issuing a security clearance); *Regan v. Wald*, 468 U.S. 222, 242-43 (1984) (deferring to the executive branch on whether there was an adequate foreign policy justification for restricting travel to Cuba).

24. See, e.g., Bradley, *supra* note 12, at 663.

branch should be given greater power than it currently has to decide whether the United States will violate international law.”<sup>25</sup> We disagree. When international law operates in an executive-constraining zone, courts should not accord substantial deference to executive interpretations of it. With respect to this category of international law, courts should scrutinize executive action closely. Indeed, courts have and should continue to require explicit congressional authorization for executive action inconsistent with this law.

Our claim, properly understood, is a modest one. Each of the characteristics of the executive-constraining zone mentioned above reflects important doctrinal and policy commitments in foreign relations law.<sup>26</sup>

*Supreme federal law.* The “supreme federal law” requirement excludes treaties that are not self-executing and, for the purposes of our Article, excludes customary international law.<sup>27</sup> International law that has the status of supreme federal law is thus part of the law of the United States—meaning that this law trumps inconsistent state law and prior inconsistent federal law, the President has the constitutional obligation to “take Care” that this law is faithfully executed, and this law falls within the substantive ambit of the “judicial Power” of the United States.<sup>28</sup> In fact, the Supreme Court, in an opinion penned by Chief Justice Roberts, has recently made this clear:

- 
25. Posner & Sunstein, *supra* note 1, at 1177; *see also id.* at 1178 (“[C]omity-related ambiguities in any grant of power to the President . . . should be settled by the executive, even if international law is inconsistent with the executive’s view.”).
  26. We do not offer any criticism in this piece of the *Chevron* doctrine as currently conceived. Our point is that *Chevron* ought not be extended to include international law in the “executive-constraining zone” not otherwise eligible for *Chevron* deference.
  27. Whether customary international law enjoys the status of “supreme federal law” is a matter of some controversy. *See, e.g.,* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*] (arguing that customary international law is not federal law and must be incorporated by the political branches before it may be applied as a rule of decision by federal courts); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that customary international law is federal law subject to common law incorporation by federal courts); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) (replying to Koh). We do not attempt to resolve this complex issue here. We exclude this body of law from our concept of the executive-constraining zone for two reasons. First, its status in U.S. law is, as a formal matter, in some doubt. *See, e.g.,* Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Second, customary international law raises several practical and structural concerns that weaken the case against substantial deference to the executive. *See infra* text accompanying notes 29, 49, 112.
  28. U.S. CONST. art. VI, cl. 2; *id.* art. II, § 3; *id.* art. III, § 1.

Under our Constitution, “[t]he judicial Power of the United States” is “vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” That “judicial Power . . . extend[s] to . . . Treaties.” And, as Chief Justice Marshall famously explained, that judicial power includes the duty “to say what the law is.” If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law “is emphatically the province and duty of the judicial department,” headed by the “one supreme Court” established by the Constitution. [S]ee also *Williams v. Taylor*, 529 U.S. 362, 378-379[] (2000) (opinion of STEVENS, J.) (“At the core of [the judicial] power is the federal courts’ independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law”). It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ.<sup>29</sup>

Chief Justice Roberts’s claim further suggests that customary international law rests on an altogether different footing, as it is not ratified by the Senate. There are structural and practical problems with extending our claims about deference to this other area, in which no United States government actor has expressly made the law binding—and in which the law is made through no constitutionally prescribed process. For that reason, we acknowledge that the case for or against deference to interpretations of customary international law rests on different arguments that are beyond the scope of our Article.

---

29. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (Roberts, C.J.) (first, second, and fifth alterations in original) (citations omitted). Much of our argument concerns how and why the robust participation of courts in foreign relations law, subject to the express instructions of Congress, is constitutionally and practically crucial. The specific line of analysis developed in this Part, however, suggests that there are also modest, but important, limits on the constitutional capacity of Congress to assign interpretive authority to the President. As described in the text, Article III assigns courts the constitutional prerogative to interpret, within the context of “Cases” or “Controversies,” the laws and treaties of the United States. U.S. CONST. art. III, § 2, cl. 1. This line of reasoning calls into question the constitutionality of section 6 of the Military Commissions Act, which purports to assign the President authority to interpret for the United States some provisions of the Geneva Conventions. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3), 2006 U.S.C.A.N. (120 Stat.) 2600, 2632 (to be codified at 18 U.S.C. § 2441 note). That is, this provision arguably intrudes on the constitutional authority of the courts if it purports to designate the President as the final arbiter of the Conventions’ meaning even in the context of otherwise properly presented “Cases” or “Controversies.”

Consider the example of the Geneva Conventions.<sup>30</sup> The text, structure, and history of the Conventions strongly support the conclusion that they are self-executing in the sense that they directly establish binding legal obligations. The Conventions prescribe detailed rules defining the proper treatment of wartime detainees. The purpose of these treaties is to establish minimum rules for the treatment of persons subject to the authority of the enemy. For example, the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) provides the following rights: (1) the right to humane treatment while in confinement (including important limitations on coercive interrogation tactics);<sup>31</sup> (2) due process rights if prisoners of war (POWs) are subject to disciplinary or punitive sanctions;<sup>32</sup> (3) the right to release and repatriation upon the cessation of active hostilities;<sup>33</sup> and (4) the right to communication with (and the institutionalized supervision of) protective agencies.<sup>34</sup> The GPW also prohibits reprisals against POWs<sup>35</sup> and precludes the use of POWs as slave laborers.<sup>36</sup> In addition, the treaties define, with some precision, the categories of persons they protect.<sup>37</sup> In short, the Conventions assign bundles of *rights* to certain categories of war detainees.<sup>38</sup>

The ratification debates in the United States lend further support to the conclusion that the treaties enjoy the status of self-executing supreme federal law. President Truman transmitted the Conventions to the Senate on April 25,

- 
30. GC, *supra* note 10; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.
  31. GPW, *supra* note 30, art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 147 (humane treatment); *see also id.* art. 17, 6 U.S.T. at 3330, 75 U.N.T.S. at 148 (rules concerning interrogation); *id.* arts. 21-48, 6 U.S.T. at 3334-54, 75 U.N.T.S. at 152-72 (rules governing conditions of confinement).
  32. *Id.* arts. 99-108, 6 U.S.T. at 3392-3400, 75 U.N.T.S. at 210-18.
  33. *Id.* arts. 118-119, 6 U.S.T. at 3406-08, 75 U.N.T.S. at 224-26.
  34. *Id.* arts. 8-11, 6 U.S.T. at 3324-28, 75 U.N.T.S. at 144-46.
  35. *Id.* art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.
  36. *Id.* arts. 49-57, 6 U.S.T. at 3354-60, 75 U.N.T.S. at 172-78.
  37. *See, e.g., id.* art. 4, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.
  38. The Supreme Court recognized in *Hamdan v. Rumsfeld* that “the 1949 Geneva Conventions were written ‘first and foremost to protect individuals, and not to serve State interests.’” 126 S. Ct. 2749, 2794 n.57 (2006) (citing OSCAR M. UHLER ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 21 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958)).

1951,<sup>39</sup> the Senate gave its consent to ratification on July 6, 1955,<sup>40</sup> and the United States ratified the treaties on July 14, 1955. In the ratification process, the treaty-makers clearly expressed the view that only a few of the provisions required implementing legislation to become operative as U.S. law.<sup>41</sup> The subsequent practice of the U.S. military also suggests that the executive branch has understood the Conventions to have the status of supreme federal law. Army Regulation 190-8 establishes policies and procedures “for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI), and other detainees (OD) in the custody of the U.S. Armed Forces.”<sup>42</sup> Notably, this regulation cites the Geneva Conventions, rather than any federal statute, as the legal basis for the military’s authority to promulgate the regulation.<sup>43</sup> The regulation also states: “In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.”<sup>44</sup> In short, the U.S. military has expressly stated that the Geneva Conventions are directly binding on all U.S. military forces as a matter of domestic law, even when they conflict with the military’s own regulations.

For these reasons, the Geneva Conventions have the status of supreme federal law.<sup>45</sup> The constitutional obligation of the President to observe, and the constitutional prerogative of the judiciary to interpret, treaties like the Geneva

---

39. S. COMM. ON FOREIGN RELATIONS, GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, S. EXEC. REP. NO. 84-9, at 3 (1955).

40. See 84 CONG. REC. 9958, 9972-73 (1955).

41. The Senate report enumerated only a handful of non-self-executing provisions. See, e.g., S. EXEC. REP. NO. 84-9, at 27 (“It should be emphasized, in any event, that the grave breaches provisions cannot be regarded as self-executing . . .”); *id.* at 25 (discussing Articles 53 and 54 of Geneva Convention I, which concern the use of the “Red Cross” symbol by private parties, and noting that “[i]t is the position of the executive branch that the prohibition of articles 53 and 54 is not intended to be self-executing”). The Senate report stated explicitly “that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions.” *Id.* at 30. The report then recommended a few minor changes to federal statutes. See *id.* at 30-31.

42. Army Reg. 190-8 § 1-1(a) (1997), available at [http://www.usapa.army.mil/pdffiles/r190\\_8.pdf](http://www.usapa.army.mil/pdffiles/r190_8.pdf).

43. *Id.* § 1-1(b).

44. *Id.* § 1-1(b)(4).

45. The Conventions have the status of supreme federal law irrespective of whether they create a private right of action. See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (holding that California law was preempted by certain bilateral agreements between the United States and European governments, despite the fact that none of the bilateral agreements created a private right of action, on the ground that the agreements preempted California law under the Supremacy Clause).

Conventions strongly suggest that *Chevron*-style deference to the executive's interpretation of this law is inappropriate. In this area, the executive is not making law; it is enforcing the rules the Senate ratified in order to restrain the executive branch in the first place.

*Law made outside the executive.* The condition that the law be made, at least in part, outside the executive excludes "sole executive agreements"—international agreements concluded by the executive with respect to some matter within its lawmaking authority. Presumably, the executive retains substantial capacity to interpret and even abandon executive-made law. Article II treaties, however, are made with the "Advice and Consent" of the Senate.<sup>46</sup> That this law is made with the approval of the Senate strongly suggests that the executive does not properly possess unfettered discretion in its interpretation. This is not to say that courts accord no deference to executive interpretations of self-executing treaties. Indeed, courts give "respect" and "great weight" to the executive's interpretation of Article II treaties.<sup>47</sup> This "deference" is, however, limited and decidedly more modest than *Chevron* deference—as evidenced by the Supreme Court's analysis of the Common Article 3 issue in *Hamdan*.<sup>48</sup> This condition also excludes from the executive-constraining zone executive action interpreting, implementing, or even violating customary international law. Again, in the context of customary international law, the relevant executive action is often the only action taken by one of the political branches—and thus the case for deference in this context is, we concede, much stronger.<sup>49</sup>

Contrast ratified treaties such as the Geneva Conventions with various "sole executive agreements." A sole executive agreement is an international agreement concluded by the President on the basis of his independent constitutional authority, without legislative authorization. Between 1789 and

---

46. U.S. CONST. art. II, § 2, cl. 2.

47. See, e.g., *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) ("[r]espect"); *United States v. Stuart*, 489 U.S. 353, 369 (1989) ("great weight" (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982))); *Factor v. Laubheimer*, 290 U.S. 276, 295 (1933) ("of weight"); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 579 (6th Cir. 1985) ("considerable deference"); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (1987) ("Courts . . . will give great weight to an interpretation made by the Executive Branch.").

48. 126 S. Ct. 2749, 2796-97 (2006).

49. See, e.g., Bradley, *supra* note 12. Note that the Posner and Sunstein proposal does not distinguish between treaties and customary international law. It also fails to distinguish between self-executing and non-self-executing treaties. This undifferentiated treatment of international law is doctrinally suspect and produces several normative problems we identify below. See *infra* text accompanying notes 109-114.

1989, the United States concluded more than 12,000 nontreaty international agreements, including 1182 such agreements concluded before 1939, some of which were sole executive agreements.<sup>50</sup> Although these agreements supersede inconsistent state law,<sup>51</sup> courts have consistently held that they do not supersede inconsistent acts of Congress.<sup>52</sup> There is good reason to assign the executive broad, even minimally constrained, interpretive and lawbreaking authority with respect to sole executive agreements given that this species of law is made without the participation of Congress. And its status in the hierarchy of federal law precludes any adverse effects on preexisting congressional action.

*Law must regulate the executive.* The condition that the law must regulate the executive excludes international law that is best understood as directed to another branch. For instance, we do not address the propriety of deference in the context of international law concerning the scope of national court jurisdiction or international law requiring countries to consider certain factors in national budgetary processes. This condition would also exclude international law that pertains to matters within the exclusive authority of the executive. The point is to limit our claim to international law properly addressed to the regulation of executive action. With respect to this class of cases, any practical advantages of judicial deference are substantially offset by

- 
50. CONG. RESEARCH SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 14 (1993) [hereinafter CRS STUDY]. Due in part to definitional problems in distinguishing between sole executive agreements and congressional-executive agreements, it is unclear how many of these were sole executive agreements. However, it is fair to assume that a substantial number were sole executive agreements.
  51. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that sole executive agreements with Germany, France, and Austria preempted a California statute); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (holding that a sole executive agreement with Iran preempted state law breach of contract claims); *United States v. Pink*, 315 U.S. 203 (1942) (holding that a sole executive agreement with Russia preempted New York common law rules governing the relative priority of competing creditors); *United States v. Belmont*, 301 U.S. 324 (1937) (same).
  52. See, e.g., *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953) (holding that an "executive agreement was void because it was not authorized by Congress and contravened provisions of a statute"); *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983) ("[E]xecutive agreements do not supersede prior inconsistent acts of Congress because, unlike treaties, they are not the 'supreme Law of the Land.'"); *Seery v. United States*, 127 F. Supp. 601, 606-07 (Ct. Cl. 1955) (rejecting the government's contention that an executive agreement is equivalent to a treaty under the Supremacy Clause). But see *Etlimar Societe Anonyme of Casablanca v. United States*, 106 F. Supp. 191, 196 (Ct. Cl. 1952) (suggesting that an executive agreement might supersede an earlier act of Congress).

the costs of assigning robust interpretive authority to the very agency that is regulated by the regime.

## II. UNDERSTANDING THE STRENGTH (OR LACK THEREOF) OF DEFERENCE CLAIMS

There are several important constraints on the strength of deference claims. For example, there are two different sources from which the legitimacy of the executive flows—democratic accountability and expertise.<sup>53</sup> Sometimes those aspects are in tension with one another—with experts within the bureaucracy decrying decisions as being made for political reasons. In these conflicts, it is not obvious that deference to the (sometimes) politically accountable President should trump an interpretation favored by the bureaucracy—at least when the expert interpretation is backed by international law principles and a statute that is to be read as consistent with international law. Accordingly, for reasons we develop later in this Article,<sup>54</sup> deference claims are greatly weakened when they are in tension with the views of the executive’s own experts.

This disjunction provides an important point of contrast with Posner and Sunstein. At points they frame the issue as merely whether “the executive’s interpretation [should] be entitled to respect.”<sup>55</sup> Put that way, there is nothing particularly controversial about their analysis, as we cannot imagine anyone saying that courts should not give “respect” to an executive interpretation. The hard question, which Posner and Sunstein’s lengthy doctrinal analysis sometimes obscures, is whether courts should permit the President to *violate* international law in the executive-constraining zone. Posner and Sunstein think that they should, for reasons based on the doctrine and policy behind *Chevron* deference. This theory, which they admit “has radical implications,” would mean that, as they put it, “the executive branch should be given greater power than it currently has to decide whether the United States will violate international law.”<sup>56</sup>

Our view is different. We believe that courts have, over two centuries, rejected invitations to provide strong deference because it risks concentrating too much power in the executive branch. We do not believe that *Chevron*,

---

53. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (“[T]he executive is the home of two different sorts of legitimacy: political (democratic will) and bureaucratic (expertise).”).

54. See *infra* Section III.E.

55. Posner & Sunstein, *supra* note 1, at 1176.

56. *Id.* at 1177.



either as doctrine or as analogy, provides much to justify Posner and Sunstein's departure from the status quo. After all, *Chevron* is based on the aforementioned twin rationales of democratic accountability and expertise.<sup>57</sup> There are reasons why both are lacking in this unique setting.

With respect to political accountability, many key foreign policy decisions are made in secret and only reach the public years later. When they do, the executive is then able to say that the nation cannot reverse course without damaging the nation's credibility. More important still, these decisions often restrict only the liberty of foreigners—who cannot vote. To rely, as Posner and Sunstein do, on political accountability to police adequately the treatment of foreigners risks serious process failures and embraces a fiction of constraint that is unlikely to matter in the real world.<sup>58</sup> For these reasons, the comparative lack of political accountability in this foreign affairs context suggests that *Chevron* may not be the appropriate lens through which to view the problem.

There is, however, the other *Chevron* rationale of expertise, which remains a crucial part of the inquiry. As then-Judge Breyer wrote two years after *Chevron*, “[C]ourts will defer more when the agency has special expertise that it can bring to bear on the legal question.”<sup>59</sup> Judicial inquiry under both the Administrative Procedure Act (APA)<sup>60</sup> and *Chevron* tends to examine whether the agency both had and used its expertise. This inquiry is explicit under the APA and, despite being forced a bit into the background by *Chevron*, is now becoming increasingly visible in recent decisions by the Supreme Court. As

---

57. See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 191 (1998) (“[T]he Court [in *Chevron*] ultimately supported its deference principle with two intertwined policy reasons—agency expertise and democratic accountability . . .”). But see Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 432 (2006) (asserting that *Chevron* deference is grounded “primarily (but not exclusively) in notions of political accountability”).

58. See Katyal, *supra* note 53, at 2341 & n.103, 2342 (questioning whether accountability provides a convincing account in the foreign affairs context); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1302–03 (2002) (describing how the military commission exemption for U.S. citizens eviscerates political accountability); cf. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (“[T]he democratic majority [must] accept for themselves and their loved ones what they impose on you and me.”); *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring) (“[N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”).

59. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

60. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

part of this inquiry, courts often emphasize the agency's *methods*, which courts have the institutional competence to monitor, as a proxy for the agency's *expertise*.<sup>61</sup>

Under the APA, courts may set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>62</sup> As part of this "hard-look," courts openly consider whether an agency's action is "the product of reasoned decision making."<sup>63</sup> Therefore, when agencies rely solely on post hoc rationalizations for their actions, they curry little favor with courts.<sup>64</sup>

*Chevron's* partial grounding in expertise emphasized two related observations: first, that the case involved a "regulatory scheme [that was] technical and complex, [for which] the agency considered the matter in a detailed and reasoned fashion," and second, that "[j]udges are not experts in the field."<sup>65</sup> Indeed, *Chevron's* second step, which asks courts to evaluate whether the agency has developed a permissible construction of the statute,<sup>66</sup> is essentially an investigation into the methods of agency decision-making. Courts and scholars alike have analogized this stage of review to the "arbitrary and capricious" standard under the APA, with its emphasis on reasoned analysis.<sup>67</sup>

Despite its provenance as a pre-*Chevron* case, *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*<sup>68</sup> is frequently cited as an illustration of the principle that a lack of deliberative procedures can condemn agency rulemaking under *Chevron's* Step Two.<sup>69</sup> In *State Farm*, the National Highway Traffic Safety Administration rescinded its

---

61. Administrative law is not the first field of law in which courts have relied on evaluation of method as a proxy for the evaluation of substance. See, e.g., *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592-94 (1993) (discussing the evaluation of methodology underlying expert scientific testimony as a test of the acceptability of the testimony).

62. 5 U.S.C. § 706(2)(A) (2000).

63. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

64. See *id.* at 50.

65. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (footnote omitted).

66. *Id.* at 843.

67. See, e.g., Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997); Richard W. Murphy, A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom, 56 ADMIN. L. REV. 1, 7 n.26 (2004).

68. 463 U.S. 29.

69. See, e.g., *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999) (enjoining enforcement of a rule because the agency failed to provide adequate reasons).

requirement that all motor vehicles be equipped with passive restraints. The Court found severe flaws in the agency's reasoning and cost-benefit analysis—underscoring how a failure to demonstrate “reasoned analysis,” informed by proper methods, overcomes the presumption of deference.<sup>70</sup>

Formal process and expertise may also prove critical in determining which cases fall outside of *Chevron* deference altogether. *United States v. Mead Corp.*,<sup>71</sup> for example, established that rules made pursuant to delegated powers are entitled to comprehensive deference under *Chevron* but that interpretations issued outside that scope receive more skepticism.<sup>72</sup> To determine whether Congress has delegated power, *Mead* instructed the reviewing court to look to the formality of the adjudication process and to whether notice-and-comment rulemaking procedures were created and observed.<sup>73</sup> And quite recently, *Gonzales v. Oregon*<sup>74</sup> rejected the Attorney General's interpretation of the Controlled Substances Act to preclude doctors from prescribing drugs for use in assisted suicide.<sup>75</sup> The Court's reasoning was explicitly grounded on the relative lack of expertise possessed by the Attorney General. The Court pointedly remarked, “The structure of the [statute], then, conveys unwillingness to cede medical judgments to an Executive official who lacks medical expertise.”<sup>76</sup>

This tour of the *Chevron* case law reveals the importance of expertise in modern deference analysis. In the foreign affairs realm, we do not doubt that there are times when the President may make a decision after heeding the expertise of the relevant agencies. But when the President fails to follow those processes, the case for deference—whether *Chevron*-style or some other

---

70. See *State Farm*, 463 U.S. at 51-57.

71. 533 U.S. 218 (2001).

72. See *id.* at 227-31 (discussing deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), among other cases).

73. See *id.* at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”). For similar reasons, *Christensen v. Harris County*, 529 U.S. 576 (2000), earlier held that an interpretation of the Fair Labor Standards Act contained in an agency opinion letter was not entitled to *Chevron* deference. The agency's interpretation was not, the Court pointed out, the result of a formal adjudication or notice-and-comment period and therefore lacked the force of law. *Id.* at 587.

74. 126 S. Ct. 904 (2006).

75. *Id.* at 925.

76. *Id.* at 921. Deference would be appropriate only if the administrative action “reflected the considerable experience and expertise the [agency] had acquired over time with respect to the complexities of the [statute].” *Id.* at 915.

variant—is much weaker. In those settings, the action appears self-interested instead of being the product of an expert agency process.

For these reasons, many of the assumptions underlying *Chevron* deference do not appear to translate well in the executive-constraining zone. These differences should lead one to question whether *Chevron* is a proper framework for a project of deference in the modern foreign affairs realm, or whether its invocation obscures more than it illuminates. To be sure, faith in *Chevron* has risen considerably both in the courts and in the academy in recent years, and so it is unsurprising that scholars would want to ride the wave of *Chevron*'s success. But trying to extend deference beyond its traditional contours might ultimately hurt the project of *Chevron* deference. If courts decided to treat the war on terror cases, for example, through the lens of *Chevron*, they might need to water down the degree of deference due to the lack of political accountability and expertise that might be involved. And the second-guessing, under *Chevron*, in those areas might ultimately bleed over to the domestic context.

Instead, it might be more productive to examine the deference question on its own terms, without invoking *Chevron*. Doing so might usefully focus questions on whether the decisions at issue fall within the executive-constraining zone, as well as whether political accountability and expertise are involved to a degree necessary to award deference.

The bottom line is that courts have scrutinized and should scrutinize executive interpretations of international law in the executive-constraining zone—when claims arising under such law are otherwise properly presented. The balance of the Article outlines several reasons why deference exceeding these bounds is problematic.

### III. THE CASE AGAINST POSNER AND SUNSTEIN'S PROPOSAL TO PROVIDE DEFERENCE IN THE EXECUTIVE-CONSTRAINING ZONE

#### A. *Evaluating the Affirmative Case for Deference*

In essence, we disagree with the premise that a change in existing law that requires awarding additional deference to the President in foreign affairs is warranted. Posner and Sunstein build their case for change not on legal precedent (with which they disagree), or on the text of the Constitution (which they concede is ambiguous),<sup>77</sup> but rather on policy reasons:

---

77. Posner & Sunstein, *supra* note 1, at 1202.

Courts say that the nation must speak in “one voice” in its foreign policy; the executive can do this, while Congress and the courts cannot. They say that the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively; the other branches cannot. As emphasized in *Chevron*, the executive, unlike the judiciary, is politically accountable as well as uniquely knowledgeable . . . .<sup>78</sup>

This line of reasoning misses the mark in several important respects and, in our view, offers no good reason to augment the deference already accorded executive interpretations of international law. First, there is no reason to conclude that the current scope of judicial deference unacceptably impedes the ability of the President to respond to a crisis. Second, wholly adequate checking mechanisms limit the power of the courts to foist unwelcome interpretations of international law on the political branches. Consider a few examples. The political branches, in the course of negotiating, ratifying, performing, and otherwise implementing U.S. treaty obligations, undertake a series of actions that signal, and at times establish, the U.S. interpretation of specific treaty terms. When the United States has authoritatively and discernibly embraced an interpretation of its treaty obligations, courts give effect to this interpretation.<sup>79</sup> The President might also issue formal interpretations of U.S. treaty obligations through the proper exercise of his substantial lawmaking (or delegated rulemaking)<sup>80</sup> authority.<sup>81</sup> In addition, the President has the constitutional

---

78. *Id.* (footnotes omitted).

79. For example, the United States often formally articulates various “understandings” and “declarations” when ratifying a treaty. *See, e.g.*, 138 CONG. REC. 8060, 8070 (1992) (concerning the ratification of the International Covenant on Civil and Political Rights). *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (detailing the U.S. treaty-making process and the role of proposed conditions in the ratification of treaties). Courts give effect to such formal interpretive acts. *See, e.g.*, *Auguste v. Ridge*, 395 F.3d 123, 142 (3d Cir. 2005) (“[F]or purposes of domestic law, the understanding proposed by the President and adopted by the Senate in its resolution of ratification are the binding standard to be applied in domestic law.”).

80. Such lawmaking or rulemaking would often qualify for *Chevron* deference under existing doctrine.

81. For example, the executive promulgated Army Regulation 190-8 as an implementation of international law on the treatment of wartime detainees. The Regulation constituted an authoritative statement on the U.S. interpretation of the 1949 Geneva Conventions and the customary law of war. The Regulation provides an interpretation of when captured combatants are entitled to POW status, how they might be stripped of that status, and the treatment regime applicable to any person deprived of any rights-bearing status under the

authority to execute the laws—this power almost certainly includes the authority to terminate, suspend, or withdraw from treaties in accordance with international law. Congress has the constitutional authority to abrogate, in whole or in part, U.S. treaty obligations via an ordinary statute—a lawmaking process that, of course, includes the President. Augmenting the law-interpreting (and lawbreaking) power of the President drastically diminishes the role of courts—thereby effectively depriving international law in the executive-constraining zone of its capacity to constrain meaningfully and,

---

Conventions. Army Reg. 190-8 (1997), available at [http://www.usapa.army.mil/pdffiles/r190\\_8.pdf](http://www.usapa.army.mil/pdffiles/r190_8.pdf).

Several of the litigation positions advanced by the administration in cases related to the war on terror contradict the interpretations provided in the Regulation. Consider two examples: (1) whether some persons fall outside the scope of the Conventions altogether; and (2) when a hearing is required to deprive a detainee of POW status. Under the Conventions, all persons captured in time of armed conflict are entitled to a rights-bearing status. See, e.g., UHLER ET AL., *supra* note 38, at 51 (“[It is a] general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international law . . . . *There is no intermediate status; nobody in enemy hands can be outside the law.*”); Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367 (2004) (providing a sustained defense of this interpretation). Army Regulation 190-8 itself arguably embraces this view. Army Reg. 190-8 § 1-6(e)(10) (requiring that all captured persons be classified as prisoners of war or civilians); *id.* § 1-5 (providing that all prisoners must be treated humanely and fairly under Geneva law); see, e.g., Brief for Respondents at 37-42, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), available at <http://www.hamdanvrumsfeld.com/HamdanSGmeritsbrief.pdf> (arguing that the Geneva Conventions do not protect terrorist groups). In addition, the GPW requires hearings to resolve any doubt about whether a detainee is entitled to POW status. Article 5 of the GPW provides:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

GPW, *supra* note 30, art. 5, 6 U.S.T. at 3324, 74 U.N.T.S. at 142. Army Regulation 190-8 provides that a qualifying “doubt” exists whenever the detainee asserts POW status. Army Reg. 190-8, § 1-6(b). For analysis of this provision, see Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667 (2006).

The Bush Administration has, to the contrary, repeatedly asserted that the GPW status of al Qaeda and Taliban detainees is beyond doubt—irrespective of whether any detainee has asserted POW status. E.g., Brief for Respondents, *supra*, at 38 (“The President has determined that the Geneva Convention does not ‘apply to our conflict with al Qaeda . . . .’ The President further determined that, ‘because [the Convention] does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.’ The President’s determination represents a classic exercise of his war powers and his authority over foreign affairs more generally . . . and is binding on the courts.” (citations omitted)).

consequently, its status as enforceable "law." Such an expansion of the President's authority also subverts the institutional capacity (and hence, the political will) of Congress to regulate the executive in these domains. These themes merit some elaboration.

Exigency does not compel a rejection of the status quo. Indeed, Posner and Sunstein's article is not concerned with whether the President can put boots on the ground without a statute; rather, it is addressed to litigation and what courts should do, typically years after the fact. Speed is often irrelevant.<sup>82</sup> So, too, is accountability. The legislature is just as accountable as the executive. And textually, of course, Congress has a strong role to play in the incorporation of international law into the domestic sphere, from its Article I, Section 8 powers to "declare War," to "make Rules concerning Captures on Land and Water," and to "punish . . . Offences against the Law of Nations," to the Senate's Article II, Section 2 power to ratify treaties.<sup>83</sup>

In one sense, then, our disagreement centers around default rules. Posner and Sunstein acknowledge that Congress can specify an antidelegation/antideference principle.<sup>84</sup> Yet oddly, their whole article frames the relevant issue as the competence of the executive branch versus that of the judiciary. But given the fact that this tussle between the executive and the judiciary will always play out within a matrix set by the legislature, it is not quite appropriate to compare the foreign policy expertise of the executive branch with that of the courts.<sup>85</sup> After all, Congress could specify a prodelegation/prodeference policy

---

82. Of course, a robust deference regime in this area might lead *ex ante* to faster executive decision-making, as the President would then have less to fear from subsequent judicial review. But it is not obvious that such speedy decision-making is a laudable policy objective, particularly when courts already provide great latitude to presidents and avoid enjoining their conduct in the midst of crises. *See, e.g.,* Katyal & Tribe, *supra* note 58, at 1272-73 (describing this view). In any event, the Senate could always build additional leeway into the treaties it ratifies to provide such assurances to the executive if it believed these assurances appropriate. And it is exceptionally doubtful that current law would provide any authority whatsoever for federal courts to enjoin the placement of troops in the midst of wartime.

83. U.S. CONST. art. I, § 8, cl. 11; *id.* cl. 10; *id.* art. II, § 2, cl. 2.

84. *See* Posner & Sunstein, *supra* note 1, at 1194-96.

85. The Supreme Court has repeatedly recognized this point, emphasizing that foreign affairs decisions are the province of two branches, not one. *E.g.,* *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive *and* Legislative—'the political'—Departments of the Government . . . ." (emphasis added)).

most of the time as well. (In fact, it has repeatedly done so.<sup>86</sup>) The more precise question is which entity is better suited to interpret a legislative act of some ambiguity, when international law principles would yield an answer that restrains the executive branch.

Once the question is properly framed, much of Posner and Sunstein's challenge to the status quo falls out. Most crucially, they fail to account for a dynamic statutory process—through which mistakes (if any) made by courts in the area can be corrected by the legislature. Such legislative corrections can take place in both the statutory and the treaty realm. If a court reads a statute in light of international law principles and Congress disagrees with those principles, it can rewrite the statute. And if a court reads a treaty to constrain the executive in a way Congress does not like, it can trump the treaty, in whole or in part, with a statute under the “last-in-time” rule.<sup>87</sup> More fundamentally, the Senate can define the role of courts up front—during the ratification process—by attaching to the instrument of ratification specific reservations, declarations, or understandings concerning the judicial enforceability of the treaty.<sup>88</sup>

With a stylized account that criticizes the relative competence of the judiciary, Posner and Sunstein make it appear that a judicial decision in foreign affairs is the last word. But that set of events would rarely, if ever, unfold in this three-player game. If the courts err in a way that fails to give the executive enough power, Congress will correct them. Surely national security is not an area rife with process failures. In that sense, current law works better than the Posner and Sunstein proposal because it forces democratic deliberation before international law is violated.

For this reason, it obscures more than it illuminates to say that “the courts, and not the executive, might turn out to be the fox.”<sup>89</sup> Such language assumes

---

86. See, e.g., Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-1991 (2000), *amended by* Trade Act of 1974, 19 U.S.C. §§ 2101-2495 (2000); International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 (2000); Trading with the Enemy Act of 1917, 50 U.S.C. app. §§ 1-6, 7-39, 41-44 (2000).

87. See *Reid v. Covert*, 354 U.S. 1, 18 n.34 (1957) (plurality opinion) (“By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . . [I]f the two are inconsistent, the one last in date will control the other . . . .” (alteration in original) (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888))); see also *Cook v. United States*, 288 U.S. 102 (1933).

88. Some have argued that the Constitution bars Congress from either imposing on the courts an interpretation of a treaty post-ratification or recharacterizing a treaty as non-self-executing post-ratification. See Carlos M. Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT’L L. 73 (2007).

89. Posner & Sunstein, *supra* note 1, at 1212. They make similar claims elsewhere. E.g., *id.* at 1216 (“Perhaps the President is wrong. Are federal judges more likely to be right?”).



a stagnant legislative process, so that the choice is “court” versus “executive,” when the real choice is really “court + Congress.” That is to say, if the courts grab power in a way that undermines the executive, Congress can correct them. The relevant calculus turns on which type of judicial error is more likely to be resolved, one in which the court wrongly sides with the President (in which case Congress would have to surmount the veto) or one in which the court wrongly sides against the President (in which case the veto would be unlikely to be a barrier to corrective legislation).

Recall that Posner and Sunstein are not addressing their argument to *constitutional* holdings by courts, but statutory ones that are the subject of *Chevron* deference. There is much to criticize when courts declare government practices unconstitutional in the realm of foreign affairs, as those practices cannot then be resuscitated by the legislature absent a constitutional amendment. But when a court’s holding centers on a statutory interpretation, the dynamic legislative process ensures that the judiciary will not have the last word.

Indeed, in this statutory area, the risks of judicial error are asymmetric—that is, judicial decisions that side with the President are far less likely to be the subject of legislative correction than those that side against him. While contemporary case law and theory have not taken the point into account, we believe that they provide a powerful reason to reject Posner and Sunstein’s proposal. Our claim centers on the President’s veto power and how the structure of the Constitution imposes serious hurdles when Congress tries to modify existing statutes to restrict presidential power.

Suppose that, for example, the President asserts that the Detainee Treatment Act,<sup>90</sup> sponsored by Senator John McCain and others to prohibit the torture of detainees, does not forbid a particular practice, such as waterboarding. A group of plaintiffs, in contrast, argue that standard principles of international law and treaties ratified by the Senate forbid waterboarding, and that these principles require reading the statute to forbid the practice. Now imagine that the matter goes to the Supreme Court. The risks from judicial error are not equivalent. If the Court sides with the plaintiffs, the legislature can—presumably with presidential encouragement—modify the statute to permit waterboarding, provided that a bare majority of Congress agrees. The

---

90. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified at 10 U.S.C.A. § 801 note, 28 U.S.C.A. § 2241, and 42 U.S.C.A. §§ 2000dd to 2000dd-1 (West Supp. 2006)). Section 6(b)(1) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 2006 U.S.C.C.A.N. (120 Stat.) 2600, 2633 (to be codified at 18 U.S.C. § 2441), amends some provisions of the War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), that apply to interrogation of wartime detainees, and these amendments present the same problems.

prospect of legislative revision explains why many of the criticisms of the Supreme Court's involvement in the war on terror thus far are entirely overblown.<sup>91</sup>

Now take the other possibility—that the Court sides with the President. In such a case, it is virtually impossible to alter the decision. That would be so even if everyone knew that the legislative intent at the time of the Act was to forbid waterboarding. Even if, after that Court decision, Senator McCain persuaded every one of his colleagues in the Senate to reverse the Court's interpretation of the Detainee Treatment Act and to modify the Act to prohibit waterboarding, the Senator would also have to persuade a supermajority in the House of Representatives. After all, the President would be able to veto the legislation, thus upping the requisite number of votes necessary from a bare majority to two-thirds. And his veto power functions *ex ante* as a disincentive even to begin the legislative reform process, as Senators are likely to spend their resources and time on projects that are likely to pass.<sup>92</sup>

So what Posner and Sunstein seek is *not* a simple default rule, but one with a built-in ratchet in favor of presidential power. The President can take, under the guise of an ambiguous legislative act, an interpretation that gives him striking new powers, have that interpretation receive deference from the courts, and then lock the interpretation into place for the long term by brandishing his veto power. For authors who assert structural principles as

---

91. One might posit the possibility that the President doesn't want to employ such practices and that Congress wants him to do so. Suppose, for example, that the Court found waterboarding not authorized under the AUMF, and that Congress passed a bill to permit the President to engage in it. In that case, the veto could conceivably be used to prevent such legislation. The specter of such a veto might lead some to think that the risk of an erroneous Court decision is symmetric—that a statutory interpretation that says the President can engage in the practice is just as much of a problem, veto-wise, as one that says that he cannot. However, the President's "take Care" and "Commander in Chief" powers suggest otherwise. In such a circumstance, waterboarding would not be employed by the United States regardless of what Congress authorized. Congress cannot *require* the President to waterboard, so even if it authorized the practice, it would not be employed by a reluctant President.

92. There are other ways to deal with this problem, such as building sunset clauses into legislation at the outset. Court interpretations that gave the President additional powers would then retire their force once the statute lapsed (but of course the President would still wield that greater power until the lapse occurred). Another option might be to sunset the judicial interpretation of the statute—so that the judicial opinion itself would lose its force as binding precedent after a specified number of years or a specified event. See Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237 (2004) (proposing this idea for national security cases). It might also be possible to envision rules that permit courts to impose sunsets on statutes, even those that they uphold, to level the playing field.

their touchstone, Posner and Sunstein's omission of the veto is striking and provides a lopsided view of what would happen under their proposal.

One common objection to our line of thinking is that the President must enjoy substantial discretion to respond to the sort of crises that might arise in the foreign relations realm.<sup>93</sup> This is certainly an important point, but it should not be overstated. No serious person contends that the President's powers in an emergency are the same as in a nonemergency. The question Posner and Sunstein are addressing, we take it, is simply how *courts* should view presidential decisions (typically, years later). For example, if a court received a temporary restraining order request in the midst of a true emergency when Congress could not plausibly respond, of course deference to the President would be appropriate unless the claims being made by the executive were thoroughly outlandish. The rest of the time—the more than 99.9%—the President's ability to respond in an emergency is beside the point. As long as courts are not enjoining executive action (an exceptionally rare event), the President should be able to take the action he deems necessary in a crisis and face the consequences in the courts later. That approach permits the President to act quickly but does not bestow on him a blank check to disregard law in the executive-constraining zone.

After all, much of the law in question is expressly designed to condition the exercise of executive power in times of national crisis. For example, international humanitarian law regulates the treatment of captured enemy fighters and civilians in times of war.<sup>94</sup> The Uniform Code of Military Justice regulates the administration of military courts—a matter that routinely, if not always, implicates national security—and it does so even during wartime.<sup>95</sup> The War Crimes Act of 1996 criminalizes violations of various treaty provisions that are only applicable in times of war.<sup>96</sup> When the object of the law in question is to regulate the government's response to national security challenges, the bare fact of a crisis does not provide a convincing rationale for greater deference. The rationale instead has to center on the raw ability of Congress to act. When Congress can act, and can respond to erroneous court decisions that restrict the President's power, the case for deference is not significantly enhanced by pointing to a "crisis."

---

93. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* (2007) (arguing that courts should defer to the executive during emergencies).

94. See GPW, *supra* note 30, art. 3, 6 U.S.T. at 3318-20, 75 U.N.T.S. at 136-38.

95. See 10 U.S.C. §§ 801-946 (2000).

96. 18 U.S.C. § 2441 (2000), *amended by* Military Commissions Act of 2006 § 6(b)(1), Pub. L. No. 109-366, 2006 U.S.C.C.A.N. (120 Stat.) 2600, 2632.

Finally, Posner and Sunstein buttress their case for deference by pointing out that “Congress has not objected to the traditional doctrines of executive deference, and until it does so, the constitutional problems seem more theoretical than real.”<sup>97</sup> There are two problems with this assertion. First, Posner and Sunstein themselves are criticizing the case law for incorporating these foreign relations canons, so it is not clear what Congress would be objecting to at present. Second, it is a mistake to view congressional silence as tacit approval, particularly in the modern context. Legislative silence in the past few years may be a reflection of party loyalty, not true policy preference. That is particularly so when the President wields the veto power, which means that any legislative rebuke to the President would require a two-thirds supermajority—a virtual impossibility in today’s political climate.

### *B. Boundary Problems*

The Posner and Sunstein proposal is predicated on an underdeveloped and descriptively flawed notion of “foreign relations law.” The authors do not define with any precision the category of cases to which their proposal applies. Given the broad scope of judicial deference contemplated, it is crucial that its substantive purview be defined more clearly. At points, they suggest that deference is appropriate in all cases involving a limited number of “international relations doctrines.”<sup>98</sup> Their proposal, however, presumably does not apply only to cases involving the routine application of these “international relations doctrines,” as they arise only in a very limited number of cases, and in any event, courts typically do accord the executive substantial deference in these contexts.<sup>99</sup> At other points, it is clear that Posner and Sunstein recommend judicial deference to executive interpretations of any law pertaining to foreign relations—irrespective of whether the instant action involves an application of one of these doctrines.<sup>100</sup> And at still other points, they seem to suggest that courts should defer to the executive’s views in any

---

97. Posner & Sunstein, *supra* note 1, at 1207.

98. See, e.g., *id.* at 1178-82 (identifying specific international relations doctrines employed by the federal courts).

99. See, e.g., Bradley, *supra* note 12, at 659-63 (collecting examples of judicial deference to the executive in several of these contexts).

100. See, e.g., Posner & Sunstein, *supra* note 1, at 1198 (arguing that what is needed is a theory of deference when the executive advances an interpretation of a statute that has “foreign relations implications”).

case implicating foreign relations, irrespective of whether the specific law applied is directed, as a general matter, to foreign affairs.<sup>101</sup>

Several well-known developments have radically increased the number of cases that *directly* implicate foreign relations: the explosion of international lawmaking, economic globalization, transnational flows of people, and transborder information flows occasioned by the transformation of communications technology.<sup>102</sup> These developments have also rendered foreign elements increasingly common in U.S. litigation—in the form of foreign parties, questions of foreign or international law, or some foreign conduct relevant to the litigation.

Such boundary problems play out along several dimensions. In one sense, the breadth of any foreign relations “effects” test is problematic. One problem is that deference triggered by foreign relations “effects” arguably applies to any *case* containing a foreign relations component—and arguably extends to any legal question that arises in such cases irrespective of whether the question is itself one of foreign relations. Consider a stylized example: an ordinary federal criminal prosecution of a foreign national may affect foreign relations, and the executive might well advance a broad interpretation of the conduct proscribed by the relevant statute as part of its policy to pressure the defendant’s home state on an unrelated diplomatic matter. Also consider two less stylized examples. An ordinary criminal prosecution under federal antiterrorism conspiracy statutes may affect foreign relations even if the conduct in question occurred in the United States—and the executive might well advance a broad interpretation of the statute in service of the war on terror. And a civil action that turns on the interpretation of statutes regulating domestic wiretapping may affect foreign relations if the challenged surveillance is justified by reference to a broader surveillance program that is, at least in part, directed abroad.<sup>103</sup> Of course, we could suggest many other examples. The important point is that a case-based foreign effects test triggers deference in a vast, potentially unacceptable, range of circumstances.

Moreover, the boundary problems persist even if the Posner and Sunstein proposal is limited to *laws* with a foreign relations component. One problem is that many cases not involving any meaningful transnational element might

---

101. *Id.* (applying the argument in the context of litigation that “affects foreign sovereigns”).

102. In other contexts, courts and commentators reference these developments as evidence that foreign relations “effects” tests are unworkably broad. *See, e.g.,* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 316–21 (1994); Bradley & Goldsmith, *Customary International Law*, *supra* note 27, at 860–71; Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1410–25 (1999).

103. *See* 18 U.S.C. § 2511(2)(d) (2000).

turn on the interpretation of statutes that peg the meaning of some important terms to treaties or customary international law. Civil or criminal proceedings alleging “torture” proceed under statutory provisions that define torture, in part, by reference to treaty law.<sup>104</sup> Such laws arguably affect foreign relations even when applied in an otherwise domestic action—say a suit between U.S. citizens arising out of conduct committed in the United States. The Posner and Sunstein proposal arguably prescribes deference to executive interpretation of these provisions even when the specific application of the rule does not involve a foreign component. Another problem is that some statutes incorporate a foreign component into their enforcement scheme. For example, Congress at times makes clear that some provisions of U.S. law apply extraterritorially. Two such statutory schemes are the federal antiracketeering and antiterrorism laws.<sup>105</sup> Any case that turns on the interpretation of such a law arguably affects foreign relations under a law-based test—irrespective of whether the instant application of this law includes any (other) foreign component—because the law in question is one that also applies outside the territory of the United States.

The fundamental question is not whether Posner and Sunstein’s proposal extends to such cases, but why it does not (or why it does). The trouble is that their policy argument proves too much. Recall that their policy rationale is grounded in the institutional advantages of the executive over courts. The identified institutional advantages strongly suggest that deference is appropriate whenever the application or interpretation of law in a foreign relations context turns on questions of prediction and value. And, as Posner and Sunstein acknowledge, in a concrete case the application or interpretation of laws governing foreign affairs almost always focuses on prediction and value because determinations must be made about whether the foreign relations component justifies treating the case like an ordinary “domestic” one.

Even if the class of laws and cases directly implicating foreign relations were narrow and clearly discernable (it is neither), the proposal seems to contemplate, and the logic of the argument supports, an exceptionally broad field of application.<sup>106</sup> Their normative claims are built upon the institutional strengths of the executive in the foreign relations context—strengths that are apparently relevant in any case touching upon foreign relations. And their descriptive theory of the “international relations doctrines” suggests that

---

<sup>104.</sup> See 18 U.S.C. §§ 2340–2340A (2000).

<sup>105.</sup> 18 U.S.C. § 1956 (2000) (racketeering); 18 U.S.C. § 2332b (2000) (terrorism).

<sup>106.</sup> For the purposes of our affirmative argument, it is important to note that, at a minimum, their proposal would recommend deference in all cases involving the interpretation and application of international law.

predictive and policy judgments pervade even routine judicial review of cases that involve foreign relations. In short, they maintain that foreign relations cases necessarily require courts to make the kind of predictive and policy judgments best left to the executive. Their proposal, then, seemingly recommends a dramatic increase in the lawmaking, law-interpreting, and even lawbreaking authority of the executive because it advocates not only an increase in the scope of deference accorded to the executive, but also an expansion of the circumstances in which deference of any sort is appropriate.

Much of what Posner and Sunstein do say about this legal domain is descriptively suspect. Their description of the distinctiveness of the foreign relations field implies that it is only thinly legalized—governed largely by diplomacy, politics, and ad hoc-ism—and, even when legalized, is unlike or inferior to ordinary domestic law. The fact is, though, that many aspects of foreign relations are governed by robust bodies of international law.<sup>107</sup> This law is often embodied in treaties and, when self-executing and ratified by the United States, forms part of the law of the United States. These treaties are also often expressly incorporated into U.S. statutes, regulations, and judge-made law. For example, international humanitarian law, the interpretation of which was at the heart of both *Hamdi v. Rumsfeld*<sup>108</sup> and *Hamdan v. Rumsfeld*, is embodied in several important treaties (including, most importantly, the Geneva Conventions) to which the United States is a party—and which were ratified by the United States Senate. These treaties are unquestionably self-executing (irrespective of whether they are directly enforceable in courts), and they have been incorporated into the UCMJ, federal criminal law, and myriad longstanding military regulations. The foreign is not easily distinguished from the domestic—and international law is not easily distinguished from domestic law.

These boundary problems are compounded by the fact that Posner and Sunstein adopt an undifferentiated view of foreign relations law. Specifically, they fail to distinguish between three important categories of “international” law: self-executing treaties, non-self-executing treaties, and customary international law. The failure to do so is doctrinally and normatively suspect. One problem is that the three varieties of international law do not have the same status under U.S. law—and the President’s constitutional obligation to comply with them varies accordingly. Courts have long recognized the distinction between self-executing treaties, which have the status of “supreme

---

107. See, e.g., Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385, 386 (2000).

108. 542 U.S. 507 (2004).

Law of the Land,”<sup>109</sup> and non-self-executing treaties, which do not.<sup>110</sup> The President, therefore, presumably has a constitutional obligation to “take Care” that self-executing treaties be “faithfully executed.”<sup>111</sup> The President has no such obligation with respect to non-self-executing treaties. The status of customary international law is less certain—though there is good reason to conclude that it might not have the status of self-executing federal law.<sup>112</sup>

Another problem is that the three varieties of international law emerge from importantly different lawmaking processes. Both self-executing and non-self-executing treaties are made via explicit action by the political branches. Nevertheless, the assumptions of the Senate and President vary importantly depending on whether the treaty is self-executing or non-self-executing. Because the touchstone of the self-executing/non-self-executing inquiry is whether the parties intended the treaty to create binding legal obligations of its own force, non-self-executing treaties do not manifest an intention by the political branches to create binding domestic law. These precatory international agreements, whatever their virtues in promoting international cooperation, often are not the product of an intentional lawmaking process. Even more problematic in this respect is customary international law. This law emerges from the general and consistent practice of states followed out of a sense of legal obligation.<sup>113</sup> As a consequence, the political branches of the United States play no well-defined role in the lawmaking process. The important point for our purposes is that the case for deference to the executive’s interpretation of some international law is stronger if that law lacks an exalted status in U.S. law or if it is the product of questionable institutional pedigree. Conversely, the case for deference is weakest when the law in question has the status of supreme federal law and is the product of rigorous lawmaking procedures.

A third problem is that the very distinction between these varieties of international law, and its importance, make clear one final boundary concern. The difficulty is that the characterization of a treaty as self-executing or non-self-executing (or perhaps the characterization of a proposition as a rule of customary international law) is itself arguably a question of foreign relations

---

109. U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land . . .”).

110. See, e.g., *Terlinden v. Ames*, 184 U.S. 270, 288 (1902); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). See generally Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995) (explaining this distinction and its implications).

111. U.S. CONST. art. II, § 3.

112. See, e.g., Bradley et al., *supra* note 27.

113. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).



law. As evidenced by the Bush Administration's submissions in the *Hamdan* litigation, the executive often rebuts treaty-based claims with the argument that the treaty in question is non-self-executing.<sup>114</sup> Under the Posner and Sunstein approach, the executive would acquire substantial authority to imbue an enactment with the status of supreme federal law (or deprive it of that status). The executive would also arguably acquire the authority to characterize a legal issue as a "foreign relations" question by finding that the question turns on the interpretation or application of customary international law.

In short, the Posner and Sunstein proposal is founded upon an underspecified, descriptively suspect "foreign relations" trigger.

### C. *Excessive Concentration of Power in the Executive*

We are also induced to reject Posner and Sunstein's proposal to depart from existing antideference law because it risks concentrating too much power in the executive. We have already said much about why we think substantial deference to the executive in some contexts presents serious doctrinal and institutional problems—and we did so in the course of defending the limited deference accorded executive interpretations of some international law under the status quo.<sup>115</sup> There, we were principally concerned with defending our proposal against claims that a lack of deference would: (1) decrease the government's capacity to respond to exigent circumstances of the sort that pervade foreign relations; and (2) weaken important accountability mechanisms in foreign relations law. Our posture was largely defensive. In this Section, we supplement that discussion by identifying some of the normatively suspect ways in which the concentration of foreign relations power in the executive would distort U.S. foreign policymaking and foreign relations lawmaking. Consider several institutional features of the executive.

Presidents are *nearsighted* in a way that other government actors are not, particularly the judiciary, which tends to be *farsighted*. The difference in outlook is a direct result of the Constitution's text and structure, which gives the former four-year terms and the latter life tenure.<sup>116</sup> Treaties and international law are in part designed to restrain short-term executives from acting in ways that are against a nation's long-term interests. To engineer a way around this problem, Posner and Sunstein pick up the mantle of "executive flexibility." But this flexibility is only one of several values protected

---

114. E.g., Brief for Respondents, *supra* note 81, at 30–34.

115. See *supra* Parts I–II.

116. Compare U.S. CONST. art. II, § 1, cl. 1, with *id.* art. III, § 1.

by our structure of government. The Constitution's chief value lies in its division of powers among the branches.<sup>117</sup> This division is skewed considerably when presidents are given the type of deference Posner and Sunstein seek. The Supreme Court has repeatedly recognized this principle, from Chief Justice Marshall's opinion in *Murray v. Schooner Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"<sup>118</sup> to Justice Story's claim that "when the legislative authority . . . has declared war in its most unlimited manner, the executive . . . cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims."<sup>119</sup>

Consider, for example, the bolt in popularity that could ensue if a President decided to interpret the Geneva Conventions so that they would not protect a huge class of individuals in a particular conflict. The President could claim that the dramatic new threat required a change in procedures, and he might even have a plausible case that the nation's security would be enhanced by the shift. The problem is that, over the long term, such carve-outs and creative interpretations of the Conventions could come back to harm America's national security. Our troops, when captured, would face the same types of reasoning by foreign leaders, who would carve U.S. troops out from protection under the same instruments.

This is a familiar problem in government, as current leaders have structural incentives to maximize the short term at the expense of future security. After all, that is why the deficit is currently \$423 billion.<sup>120</sup> Treaties can be seen as commitment strategies on the part of political leaders to bind themselves in advance to a course of action that will have long-term payoffs.<sup>121</sup> As Justice Kennedy recently put it, "Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of

---

117. See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.").

118. 6 U.S. (2 Cranch) 64, 118 (1804); see also *MacLeod v. United States*, 229 U.S. 416, 427 (1913) (interpreting an executive order during the Spanish-American War so that it would be "consistent with the principles of international law").

119. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting). The majority did not disagree. See *id.* at 125-28 (majority opinion).

120. OFFICE OF MGMT. & BUDGET, OVERVIEW OF THE PRESIDENT'S 2007 BUDGET 4 (2007), <http://www.whitehouse.gov/omb/pdf/overview-07.pdf>.

121. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 24-28 (2d ed. 1980); T.C. Schelling, *Economics, or the Art of Self-Management*, 68 AM. ECON. REV. 290 (1978).

stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”<sup>122</sup>

Treaties are part of this system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest. Unlike the political branches, which labor under short-term incentives, particularly in times of crisis, the judiciary is the only branch that harbors a long-term perspective. The structural protections of Article III ensure that judges can imbue their decisions with a sensibility not derived from maximizing short-term advantage. As one of us has previously argued, “[A]s the only federal officials with life tenure and guaranteed salary, federal judges have structural advantages that enable them to stand above the political fray and provide other officials with a detached, perhaps unpopular, perspective.”<sup>123</sup> These institutional characteristics of federal judges cannot be easily discarded: they go back to core structural principles and provide a strong rationale for the Supreme Court’s belief that it is the ultimate expositor of the meaning of treaties.<sup>124</sup> The Court has not abdicated this responsibility to the executive, and with good reason. A President’s short-term incentives may not be consonant with the long-term needs of the nation.<sup>125</sup>

Return again to our example of a President who takes a radically narrow view of the Geneva Conventions. We stated that he might enjoy a quick rise in his popularity and perhaps even a modest temporary increase in the nation’s safety, only to find years later that the diminished credibility of the United States far eclipsed the short-term benefits. In the past, however, the constraint on an executive acting in this way centered far more on the immediate reprisal of the other power—if the United States treated German prisoners poorly in World War II, then Germans would do the same to U.S. troops. But in the modern era, as the world drives toward multipolarity, international questions cannot be answered simply by saying that the United States can treat citizens of another country in violation of international law when that particular country

---

122. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring in part).

123. Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1711–12 (1998).

124. See *supra* text accompanying note 29.

125. Our point is not that international law constitutes an immutable set of constraints on executive action. Of course, it is well established that Congress may enact legislation authorizing the executive to violate treaties. See *supra* note 87 (quoting *Reid v. Covert*, 354 U.S. 1, 18 n.34 (1957) (plurality opinion)). And although the President, acting unilaterally, arguably has the constitutional authority to terminate or suspend treaties in accordance with the terms of international law, this authority is conditioned by the express and implied terms of the treaty itself. Our point is that there are sound structural reasons for assigning the judiciary a more robust role in interpreting treaties that condition the exercise of executive power. We developed this point further *supra* Parts I–II.

does not object. That nation might not object because it needs American diplomatic support, or because it fears losing foreign aid, or for some other reason, but what matters in today's world is the reaction of many nations, not one.<sup>126</sup>

Posner and Sunstein suggest that our argument is self-defeating because if a President is nearsighted, that would "be true when presidents sign treaties as well as when they seek to evade them."<sup>127</sup> This is not a good argument for an obvious structural reason. The Constitution requires treaties to be ratified by the Senate by a supermajority.<sup>128</sup> The supermajority Senate ratification rule acts as a built-in constraint on a President's nearsightedness at the signing stage. Under Posner and Sunstein's formula, however, the President would operate under no such constraint when he sought to defy law in the executive-constraining zone. If anything, as we point out elsewhere, under Posner and Sunstein's approach, a supermajority of *both* Houses would be required to set things right whenever the President defied law in the executive-constraining zone. Congress would need to amend its old law, which in turn would require a rare, almost unnatural (in today's climate due to the rise of political parties), supermajority before Congress could restate its intent to constrain the President.<sup>129</sup> In short, the structural features of the Constitution cut strongly against Posner and Sunstein, and it is folly to think that the treaty-signature stage is at all comparable to what these authors have in mind when they seek to give the President the ability to violate international law.

In addition to this structural check, the lawmaking process itself imposes a certain discipline that counteracts the shortsightedness of the President. Given that international law in the executive-constraining zone restricts the freedom of action of the President, the executive is motivated in the process of

---

126. The point is easy to spot even in the first few pages of Posner and Sunstein's article. Consider their second highly stylized example, in which Immigration and Customs Enforcement (ICE) seeks "to detain dangerous aliens who cannot be repatriated because their home countries will not accept them." Posner & Sunstein, *supra* note 1, at 1174. They assure us that there is no "strong case" that "foreign sovereigns would be offended" in this example. *Id.* at 1175. But there is no reason to believe them. Perhaps the host country might not be offended at the moment, but that says little about a future regime of that nation. Moreover, it says nothing about other countries' reactions. Guantánamo Bay is not simply a source of concern to those nations with nationals there—much of the most vehement criticism comes from countries that do not have citizens there.

127. *Id.* at 1215.

128. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

129. See *supra* text accompanying notes 89-91.

negotiating and concluding such treaties to analyze systematically the very sort of prediction and value issues Posner and Sunstein describe—and to do so in a way that accounts for a broad range of scenarios in which the rules might be relevant. It is, in the end, law that is made—law that is not easily changed or costlessly evaded. In other words, the self-binding legal outputs of this sort of executive action encourage a more farsighted perspective. Lawmaking, in short, is a very different enterprise than policymaking or even law-interpreting. Moreover, the Posner and Sunstein approach would substantially weaken this disciplining effect of the international lawmaking process by unsettling the assumption that the law made at Time 1 will meaningfully constrain at Time 2.

For these reasons, the deference Posner and Sunstein seek is quite unlike the garden-variety *Chevron* case, in which the agency is doing nothing more than bringing its expertise to bear in administering a statute. The authors partially acknowledge this,<sup>130</sup> only to disregard its importance. There are good reasons why *Chevron* deference should not be awarded to agencies when they interpret organic law in the executive-constraining zone<sup>131</sup>—reasons that go back to the Guardians of Plato's *Republic* or to the more recent allegory of foxes and henhouses.<sup>132</sup>

Whatever the status is of this doctrine in the domestic context, it has great force in the foreign affairs realm. It is particularly odd that at a moment in which international law matters tremendously to our nation's security, and that of the world, Posner and Sunstein want to shrink its importance. Their theory needs to take account of the massive changes wrought by World War II and its aftermath, in which a comparatively stronger international law norm has arisen

---

130. See Posner & Sunstein, *supra* note 1, at 1208–09.

131. See, e.g., *Gonzales v. Oregon*, 126 S. Ct. 904, 908 (2006) (stating that an agency's interpretation of an ambiguous statute may only receive deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001))); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 *CARDOZO L. REV.* 989, 1010 (1999) (arguing that *Chevron* should not apply “when an agency is asserting authority outside its core powers”).

132. Posner and Sunstein recognize a portion of this concern, mentioning the traditional reluctance to defer to the Department of Justice in criminal investigations. Posner & Sunstein, *supra* note 1, at 1219. Their response, that Congress has delegated powers under the AUMF, doesn't grapple with the central point. What undergirds the traditional reluctance is the fear of presidential self-dealing—that a President can interpret a statute to expand his own power over individuals. That fear exists in the context of foreign affairs just as it does in the criminal prosecution context. Both constitutional law and international law have developed precisely to check this concentration of power.

that promotes global stability and the collective pursuit of common goals.<sup>133</sup> Indeed, the international legal framework within which foreign relations are conducted was revolutionized in this era. The United Nations, whatever its limitations, now provides a highly legitimated institutional vehicle for global cooperation in an astonishingly wide array of substantive domains—including national security and human rights. International human rights and humanitarian law provide a widely accepted normative framework that defines with increasing precision the constitutional principles of the international order. These developments, and many others like them, provide an institutional structure by which, and a normative framework within which, effective and principled international cooperation is possible. Posner and Sunstein would set that project back when the United States, and the world, need it the most. The dramatic demands being placed on our military, as the United States functions as the world's only superpower and predominant policeman, mean that humanitarian treatment norms will impact our nation greatly as we contemplate long-term deployment of troops in a variety of countries around the world.

Critics, including Posner, advance in response a caricature of this argument, stating that “[t]here is no reason to think that if the Bush administration improves or worsens the conditions of detention it will have any effect on al Qaeda’s behavior toward captured Americans or other westerners.”<sup>134</sup> But that, of course, is not the argument responsible scholars and advocates have advanced against these niggardly Geneva Convention interpretations. The real argument is that the United States contributes to the development of law-of-war norms when it is seen as complying with them, and that this compliance means that *nation-states* that might otherwise be tempted to treat our soldiers badly do not. A group of distinguished retired generals and admirals argued that “other governments have begun citing United States policy to justify their repressive policies,” such as Egypt, Liberia, Zimbabwe, Eritrea, China, and Russia.<sup>135</sup> This claim has been a consistent theme espoused by the uniformed military, as well as by Colin L. Powell when he served as

---

133. *E.g.*, GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 77 (1994) (“The several moves made in and after 1945 to regulate what States did to their own people came therefore as a striking innovation, an inroad without precedent into State sovereignty as it had always been understood . . .”).

134. Eric Posner, *Apply the Golden Rule to Al Qaeda?*, WALL ST. J., July 15–16, 2006, at A9.

135. Amicus Curiae Brief of Retired Gens. et al. at 8–9, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05–184), available at <http://www.hamdanvrumsfeld.com/GeneralsandAdmirals.pdf>.

Secretary of State.<sup>136</sup> The military's fears about reciprocity underscore the dangers of relying on politicians, such as the President, to set aside longstanding treaty commitments through the reinterpretation of those commitments.

To be sure, the U.S. government can set international law aside. The question is which actor of the government should possess the power to do so in nonemergency situations. And giving that power to the President alone has always been a terrible idea in a democracy, as *Charming Betsy*<sup>137</sup> and its progeny have recognized. Instead, greater deliberation about such momentous choices is necessary. The nonapplication of *Chevron* deference to the realm of foreign affairs, therefore, is justified as a deliberation-forcing measure, a point Sunstein has appreciated in other contexts.<sup>138</sup>

Posner and Sunstein respond to the concerns about undue expansion of executive power by claiming that presidents can have political motivations in the domestic *Chevron* context and that "judges may have biases of their own."<sup>139</sup> Both arguments are weak. There are particular reasons to fear the

136. For example, Major General Scott Black, the Judge Advocate General of the Army, testified before the Senate Judiciary Committee that "[t]here cannot be two standards: If we are to hold enemy combatants to the War Crimes Act, we must be prepared to hold U.S. personnel to the act." *U.S. Senator Arlen Specter (R-Pa) Holds a Hearing on the Detainee Trials*, CQ TRANSCRIPTIONS, Aug. 8, 2006 (quoting Major General Black), available at <http://www.westlaw.com> (find citation "8/3/06 eMediaPT 12:13:00"). He elaborated,

The United States should be an example to the world, sir. And as we put our soldiers in harm's way, we must always consider how they will be treated if they are captured. Reciprocity is something that weighs heavily in all of the discussions that we are undertaking, as we develop the process and rules for the commissions. And that's the exact reason, sir, that the treatment of soldiers who will be captured on future battlefields is of paramount concern.

*Id.* Brigadier General David M. Brahms, USMC (Ret.), a former Staff Judge Advocate to the Commandant of the Marine Corps, similarly warned, "Our central theme in all this has always been our great concern about reciprocity . . . We don't want someone saying they've got our folks as captives and we're going to do to them exactly what you've done because we no longer hold any moral high ground." Neil A. Lewis, *Military Lawyers Prepare To Speak on Guantánamo*, N.Y. TIMES, July 11, 2006, at A14 (quoting Brigadier General Brahms). For Secretary of State Colin Powell's views on the subject, see Memorandum from Colin L. Powell, Sec'y of State, to the Counsel to the President (Jan. 26, 2002), available at [http://msnbc.com/modules/newweek/pdf/powell\\_memo.pdf](http://msnbc.com/modules/newweek/pdf/powell_memo.pdf).

137. 6 U.S. (2 Cranch) 64 (1804) (holding that statutes should be construed so as to avoid conflicts with international law).

138. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 24-28, 31 (1999).

139. Posner & Sunstein, *supra* note 1, at 1207.

concentration of power in the foreign affairs context (such as process failure), and there is no particular case to be made for political bias of the courts today. Posner and Sunstein also offer the point that “[a]ny relevant ‘bias’ on the part of the executive in the domain of foreign affairs is best understood as the operation of democracy in action.”<sup>140</sup> This claim simply begs the question as to what interpretive power a democracy delegates to the President. And it is contradicted by their point, in the preceding paragraph, that these matters are so low-visibility that public accountability is a fiction anyway.<sup>141</sup>

The authors might have a separate response, picking up on their claim that their theory only kicks in when a statute is “genuinely ambiguous”<sup>142</sup> or “vague or ambiguous.”<sup>143</sup> We have no idea what this actually means. And we believe that whatever we think it means is not what Posner and Sunstein think it means. That, actually, is the deep point. Claims of “genuine ambiguity” are themselves determined with reference—even sometimes unconscious reference—to latent policy goals. If Posner and Sunstein’s theory became law, for example, we do not believe it would only impact “genuinely ambiguous” cases; rather, it would alter the number of cases in which courts found statutes to be “genuinely ambiguous.”

Consider, in this respect, the authors’ own example of *Hamdan*. Without defending the proposition, they claim that the statutes at issue in the case, such as the UCMJ, “are at least ambiguous” and that it is “not easy” to claim otherwise.<sup>144</sup> But this is certainly not the way the Supreme Court, or commentators, viewed the matter.<sup>145</sup> After all, the very statute that the government relied upon to claim that the military commission was authorized permitted trial for violations of the “laws of war.”<sup>146</sup> The petitioner argued, successfully, that a statute that permitted trial for violation of the laws of war

---

<sup>140</sup>. *Id.*

<sup>141</sup>. *Id.* at 1206.

<sup>142</sup>. *Id.* at 1217.

<sup>143</sup>. *Id.* at 1227.

<sup>144</sup>. *Id.* at 1223.

<sup>145</sup>. Posner and Sunstein also find *Hamdan* in tension with *Hamdi* because the latter approved of detentions. *Id.* at 1225. There is no inconsistency at all. There is a longstanding tradition of viewing “force” as including the power to detain, given that both are forward-looking powers of the government, in contrast to decisions about criminal guilt and innocence, which are inherently retrospective and not included as “force.” See Brief of Gen. David Brahms & Gen. James Cullen as Amici Curiae in Support of Petitioner at 5-13, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) (citing cases); Katyal & Tribe, *supra* note 58, at 1270 (distinguishing between prospective war-fighting and retrospective justice).

<sup>146</sup>. 10 U.S.C. § 821 (2000).



could not have contemplated such trials in a tribunal that itself violated the laws of war.<sup>147</sup>

We do not want to refight these battles in these pages. Instead, we simply point out that the same policy concerns that animate the authors' *Chevron* proposal are often doing the work when claims of statutory ambiguity are made.<sup>148</sup> In such settings, Posner and Sunstein's policy concerns can transform most statutes into texts that are, to use their phrase, "at least ambiguous."<sup>149</sup> For example, the United States government pointed to these policy concerns to explain why the treaties and statutes at issue in *Hamdan* did not protect Salim Ahmed Hamdan — arguing that the President's determination, in a time of war, itself showed that the relevant law should be read against Hamdan.<sup>150</sup>

By extending *Chevron* deference to foreign affairs decisions, therefore, the Posner and Sunstein proposal might, perhaps unintentionally, lead to a greater number of statutes being found "ambiguous." By centering the discussion on the limited expertise and limited political accountability of the executive branch in this area, as well as on the structural dangers of deference due to the veto

---

147. See Brief for Petitioner at 39-40, *Hamdan*, 126 S. Ct. 2749 (No. 05-184).

148. Take another example: Sunstein has written that the Foreign Intelligence Surveillance Act (FISA) of 1978, 50 U.S.C. §§ 1801-1862 (2000), seemingly permits the domestic surveillance of Americans. That is not an easy claim to make. But Sunstein finds ambiguity — and in part does so due to the same policy judgments that undergird the Posner and Sunstein theory:

[T]he question is how to square the AUMF with [FISA]. It isn't unreasonable to say that the more specific statute, FISA, trumps the more general, so that the wiretapping issue is effectively governed by [FISA]. But if surveillance is taken to be an ordinary incident of war, and if the President has a plausible claim to inherent authority, this argument is substantially weakened. Note that the President isn't forbidden, by the precedents, from arguing that [FISA] is unconstitutional insofar as it forbids him from engaging in the relevant activity . . . . I am not sure how strong this argument is; if it is pretty strong, there is good reason to read the AUMF to allow the President to wiretap, and not to read [FISA] so as to forbid wiretapping, simply to avoid the hard constitutional question.

Cass R. Sunstein, *Presidential Wiretapping: Disaggregating the Issues*, The University of Chicago Law School: The Faculty Blog, Dec. 20, 2005, [http://uchicagolaw.typepad.com/faculty/2005/12/presidential\\_wi\\_1.html](http://uchicagolaw.typepad.com/faculty/2005/12/presidential_wi_1.html). By elevating the foreign affairs powers of the President beyond the executive's ordinary reach, the Posner and Sunstein article risks becoming a prism through which to view the ambiguity of statutes themselves. That is to say, despite Posner and Sunstein's theoretical disclaimers, it is unlikely that a court that adopted their exuberant view of executive power would find unambiguous statutes that constrain the President as often as would a court that took a more restrained view of executive power.

149. Posner & Sunstein, *supra* note 1, at 1223.

150. See Brief for Respondents, *supra* note 81, at 23-26, 35-39, 48.

power, we believe our proposal, which cabins deference in the executive-constraining zone, provides a better avenue for courts to follow.<sup>151</sup>

That avenue is particularly important in cases such as *Hamdan*, in which the executive possesses self-interested reasons for advancing a particular statutory interpretation at the expense of individual liberty. It is no accident that *Chevron* deference has not been extended to criminal cases. As Justice Scalia has said:

[T]he vast body of *administrative* interpretation that exists—innumerable advisory opinions not only of the Attorney General, the OLC, and the Office of Government Ethics, but also of the Comptroller General and the general counsels for various agencies—is not an administrative interpretation that is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* The law in question . . . is not administered by any agency but by the courts. . . . The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.<sup>152</sup>

Providing *Chevron* deference in *Hamdan*-like situations creates the same problem as providing it to the Justice Department in the ordinary criminal prosecution context. It permits prosecutors to advance self-interested interpretations in circumstances in which Congress may not have intended to deprive someone of her liberty (or to deprive her of as much of her liberty as the executive would).

Posner and Sunstein offer one other response, which is that “other canons of interpretation, most notably constitutional avoidance, operate as a check on executive authority.”<sup>153</sup> This is a rather odd sort of check with respect to the detainee examples. After all, both authors have acknowledged, if not endorsed,

---

151. Posner and Sunstein themselves unwittingly admit that legislative ambiguity is far more common than even the Court supposes. After all, they claim that *Chevron* rests on the principle that “courts defer to agency interpretations of law when and because Congress has told them to do so”—and that this is just a “legal fiction” because “Congress hardly ever states its instructions on the deference question with clarity.” Posner & Sunstein, *supra* note 1, at 1194. The possibility of a “legal fiction” throws a monkey wrench into their proposal, as it means that in the real world their proposal is not likely to be limited to cases of genuine legal ambiguity.

152. *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (citation omitted).

153. Posner & Sunstein, *supra* note 1, at 1228.

previous Court decisions stating that the Constitution does not protect detainees abroad.<sup>154</sup> Indeed, the functional absence of the doctrine of constitutional avoidance in this context is just one more reason why *Chevron* rules should not apply here, because our system cannot rely on that check the way it does in the domestic sphere.

Moreover, the nature of the underlying constitutional questions illustrates a deeper problem with reliance on the constitutional avoidance canon, namely that the scope and content of constitutional checks fluctuate depending on other important legal characterizations that the President can manipulate. For example, noncitizen enemy combatants captured and detained outside the sovereign territory of the United States might be entitled to substantially less constitutional protection than other persons subject to executive authority.<sup>155</sup> The crucial legal questions then become: Who is an “enemy”?<sup>156</sup> What process is due persons facing such a classification?<sup>157</sup> What qualifies as the sovereign territory of the United States?<sup>158</sup> Take another example: the proper role of Congress and the courts in second-guessing executive action turns substantially on whether the President acts pursuant to his inherent constitutional authority.<sup>159</sup> But whether he does so turns substantially on (1)

---

154. See, e.g., Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 122 n.119 (2005) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 55 n.34, 100 n.248, 103 nn.263–64 (same). Posner and Sunstein claim that they are simply describing existing law, not endorsing it. Posner & Sunstein, *supra* note 1, at 1225 n.178. While we think that they should take a position on *Eisentrager* (and suspect that they have one), it is not at all necessary to our argument. After all, their “description” of existing law explains why constitutional avoidance is simply not a counterweight to their *Chevron* proposal—as the Constitution does not apply and therefore the avoidance doctrine is not triggered. Indeed, the existence of *Eisentrager* may itself account for why existing law has not embraced Posner and Sunstein’s proposal, as the check on executive abuse is not as great as they suppose.

155. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990); *id.* at 277 (Kennedy, J., concurring).

156. See *Eisentrager*, 339 U.S. at 763.

157. See *Verdugo-Urquidez*, 494 U.S. at 264–65 (examining the text of the Fourth and Fifth Amendments); *Downes v. Bidwell*, 182 U.S. 244, 283 (1901) (extending only fundamental rights).

158. See *Rasul v. Bush*, 542 U.S. 466, 475 (2004) (holding that Guantánamo lies within the territorial jurisdiction of the United States).

159. See, e.g., Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2672 n.68 (2005) (“[T]he likelihood of [constitutional] conflicts depends on judgments about the merits—the substance of the underlying constitutional principles. If the President has inherent authority to act in the relevant domains, then no such conflicts will arise, simply because clear statement principles will not be required. Nor will conflicts arise if the

how the context of his actions is characterized (is the United States at war, and are all military detention facilities part of the battlefield?), and (2) how the persons against whom his action is directed are classified (are the relevant persons enemy combatants?).

The important point is that assigning the executive the kind of authority contemplated by Posner and Sunstein would, in many circumstances, provide an end run around the constitutional avoidance canon by permitting the executive to redefine background facts that would impact whether the canon would be applicable in the first place. Ultimately, providing the President with such powers is in tension with the rule of law, for it allows the executive to substitute case-by-case factual characterizations for law, and to do so in areas that are concerned with restraining the powers of the executive.

The very fact that Posner and Sunstein are willing to permit a clear statement rule before the executive deprives an individual of her constitutional rights is itself instructive. For them, “constitutionally sensitive rights should probably have a kind of interpretive priority” that would trump a presidential interpretation.<sup>160</sup> But there is nothing obviously unique about the Constitution that should itself justify privileging that source of rights over others. After all, the Supremacy Clause itself provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .<sup>161</sup>

Now it might be possible, textually, to say that the enumeration of the Constitution as first in that list might entitle it to some special status, but Posner and Sunstein do not offer such an argument. To the contrary, as we show, they actually offer something closer to the reverse.

Recall Posner and Sunstein’s justification for the *Hamdan* decision. They claim that it can be justified as “a distinctive kind of nondelegation canon—one that requires Congress to speak clearly if it seeks to allow the executive to depart from the usual methods for conducting criminal trials.”<sup>162</sup> On this view,

---

Constitution’s various safeguards of liberty rarely apply when the AUMF is properly invoked.”).

<sup>160</sup> Posner & Sunstein, *supra* note 1, at 1223; *see also id.* at 1211 (“It is reasonable to say that Congress must speak clearly if it seeks to raise a serious constitutional question and thus that the executive may not raise such a question on its own . . .”).

<sup>161</sup> U.S. CONST. art. VI, cl. 2.

<sup>162</sup> Posner & Sunstein, *supra* note 1, at 1224.

"*Hamdan* rests on a distinctive clear statement principle for use of nontraditional institutions for adjudicating guilt or innocence."<sup>163</sup> The problem with this view, however, is that Posner and Sunstein do not actually believe that this principle has anything to do with the Constitution at all. They have already written that the Constitution does not protect individuals at Guantánamo, so their reasoning has to depend on some sort of *nonconstitutional* avoidance doctrine. They genuflect to this point,<sup>164</sup> only to disregard its importance. For if avoidance doctrines can be employed in nonconstitutional settings, as Posner and Sunstein evidently believe, there is no principled way to insist that foreign relations settings are places exempt from avoidance doctrines, too. At least, there is no principled way to do so without understanding that what is actually driving the *Hamdan* exception for Posner and Sunstein probably looks like the motivations driving our conception of the executive-constraining zone. The reason why *Hamdan* came out the way it did is not because it fit into some constitutional avoidance exception to *Chevron*, but rather because the issue upon which the executive sought deference was one in which it had too much self-interest at stake, as the relevant source of law was supposed to curtail executive power.

Posner and Sunstein launch one other volley in response to our argument, claiming that their proposal would "tether the executive to the expressed will of Congress, [and therefore] would not give the executive lawbreaking powers."<sup>165</sup> We acknowledge that their article at points says as much. For example, they state early on that "[t]he domain of our analysis is restricted to genuine ambiguities in governing law."<sup>166</sup> But, of course, their preceding two paragraphs describe their article as "controversial" because they claim "that the executive branch should be given greater power than it currently has to decide whether the United States will *violate* international law."<sup>167</sup> And to make the point even clearer, they go on to say that "[a]n additional implication, and an especially controversial one, is that comity-related ambiguities in *any* grant of power to the President, including an authorization to use force, should be settled by the executive, *even if international law is inconsistent* with the executive's view."<sup>168</sup>

---

163. *Id.* at 1225.

164. *See id.* at 1224 ("[T]he use of a clear statement principle of this sort would be easiest to defend if it were undergirded by the Due Process Clause.").

165. *Id.* at 1199.

166. *Id.* at 1178.

167. *Id.* at 1177 (emphasis added).

168. *Id.* at 1178 (emphasis added).

While we appreciate that the two authors may be approaching the matter from different perspectives, their bipolar analysis makes it impossible to evaluate, as any evaluation prompts a shell game, in which they use one or another of these two poles to respond to potential criticism. We therefore have concentrated our response on one strand of their proposal, which advocates giving the President more deference than he “currently has” when he “violate[s] international law.”<sup>169</sup>

Of course, Posner and Sunstein might suggest that our broader claim in this Section does not provide any reason to reject their proposal in full. At most, they might argue, we have demonstrated the need for a nondelegation canon for actions in violation of international law of a certain character. In other words, they might argue that *Chevron* deference to the executive in foreign affairs law is appropriate in general, irrespective of any nondelegation canons that might limit its application in specific contexts. On one level, this is certainly correct. On a deeper level, though, we submit that the scope and content of the nondelegation canon our argument supports would bar the application of their proposal in the category of cases in which it is most likely to make any difference at all.

#### *D. The Withering of Congress's Role*

If adopted, one of the most dangerous byproducts of Posner and Sunstein's theory may be to weaken, as a practical matter, the ability of Congress to legislate meaningful constraints on executive power. Members of Congress, when enacting legislation, would now have to contemplate whether any statutory ambiguities would be used to permit the President to violate longstanding treaty commitments.<sup>170</sup> The result of their proposal, *ex ante*, may be to instill trepidation in Congress about enacting legislation in the first place.

For example, imagine how Congress, under the Posner and Sunstein model, would react to an administration's request to pass a Use of Force Resolution. Members would have to fear that such legislation could be used by the President in the future as a blank check to permit him to disregard international law. The upshot of such fear is that they might not pass such a statute at all. Instead, some would predictably embrace theories about the

---

<sup>169</sup>. *Id.* at 1177.

<sup>170</sup>. Posner and Sunstein, in an odd choice for supposed realists, respond by stylizing their problem as one of the President versus the courts, claiming that “*Chevronizing* foreign relations law would not reduce legislative power; it would reduce judicial power.” *Id.* at 1200 n.94. That might be a nice theoretical model, but it does not appear to grapple with the deep-seated legislative inertia problem.

“inherent” right of the President to use military force in times of crisis; others would simply stay quiet and let the President use force. The alternative to legislative silence—that Congress would have to enact such laws with such a degree of specificity (for example, no domestic spying, no torture, no indefinite detentions)—would demand such high foresight and political maneuvering that it would often be safer for Congress to decide to do nothing.

The risk of furthering congressional inactivity exists even with contemporary presidential interpretations of the AUMF. Congress already has to fear, with or without *Chevron* deference, that the executive will distort its statutes to permit activities that it did not intend.<sup>171</sup> But what stops that risk from flowering today is the courts—which have reassured Congress that it can pass something like the AUMF and not have it interpreted in ludicrous ways by the executive.<sup>172</sup> In this respect, cases such as *Rasul v. Bush*<sup>173</sup> and *Hamdan* are not only democracy-forcing *ex post* in that they compel Congress to act to give the executive additional powers in those specific areas; they are also democracy-forcing *ex ante*. They reassure the legislature that it can pass laws without having them subject to wild-eyed, self-interested interpretations by the executive.

By contrast, Posner and Sunstein’s proposal would encourage executive branch gamesmanship and might lead, *ex ante*, to fewer congressional enactments in the area. Congress would have to fear the risk of unwittingly authorizing a variety of activities that it could not adequately foresee, and it would therefore stay silent. The result would be to further the democratic deficit that already plagues the nation in the legal war on terror—in which the

---

171. As George Will has recently put it:

The next time a president asks Congress to pass something akin to what Congress passed on Sept. 14, 2001—the Authorization for Use of Military Force (AUMF)—the resulting legislation might be longer than Proust’s “Remembrance of Things Past.” Congress, remembering what is happening today, might stipulate all the statutes and constitutional understandings that it does *not* intend the act to repeal or supersede.

But, then, perhaps no future president will ask for such congressional involvement in the gravest decision government makes—going to war. Why would future presidents ask, if the present administration successfully asserts its current doctrine? It is that whenever the nation is at war, the other two branches of government have a radically diminished pertinence to governance, and the president determines what that pertinence shall be.

George F. Will, *No Checks, Many Imbalances*, WASH. POST, Feb. 16, 2006, at A27.

172. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–21 (2004) (plurality opinion) (interpreting the AUMF in light of “longstanding law-of-war principles,” including the Geneva Conventions).

173. 542 U.S. 466 (2004).

President has been acting without the explicit support of the legislature. This presidential netherworld is bad for the reputation of the United States, as well as for our deliberative democracy.

There is no way to “prove” that such a result would follow from Posner and Sunstein’s proposal short of adopting it and watching what would unfold. But the abdication of Congress for the five years after the September 11, 2001, attacks in many of the key decisions in this realm suggests that strong deference claims might make it harder to enact legislation. That view gains some support from structural principles as well. After all, our Founders set up the tripartite government to make it difficult for government to take action that deprives people of their rights. Short of an emergency that precluded Congress from acting, the concurrence of any one branch alone in such a scheme was not considered enough to change the status quo baseline.<sup>174</sup> Instead, Congress had to pass a law, the President had to enforce the law, and the courts had to uphold the law. All three branches thus had to agree under this constitutional framework—a key feature of the document that led to greater deliberation and dialogue among the branches.

Posner and Sunstein would flip that standard assumption. Under their view, Congress would necessarily have to fear that its authorizing legislation, in a world of *Chevron* deference, could be used for radically unintended purposes. It would be entirely natural for the legislative body, faced with such a dilemma, to be led down the path of doing nothing at all. This problem does not manifest itself as much in the domestic context, as there Congress has to act before the President can change the status quo. In the foreign policy arena, however, Congress knows that the President can always use his “inherent authority” to use military force regardless of what it does, and it may therefore find it safer to stay silent than to legislate.

Posner and Sunstein respond to these arguments by suggesting that their proposal would force more, not less, legislative restriction over the President.<sup>175</sup> They surmise that a future Congress “might issue a more detailed AUMF, one that more carefully described the entities against which force could be used and the limits under which the President might operate, rather than leaving those issues to a President it did not trust or to courts that had no expertise in the area.”<sup>176</sup> Their last words are just one tip-off among many that this claim is a weak one. After all, if Congress didn’t trust the courts, the status quo provides

---

174. See Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1368–69 (2001) (discussing the Constitution’s “rights-protecting asymmetry,” which requires the concurrence of all branches); Katyal & Tribe, *supra* note 58, at 1268–69 (same).

175. See Posner & Sunstein, *supra* note 1, at 1199.

176. *Id.*



it plenty of opportunities to craft a more calibrated AUMF. But of course Congress hasn't done that, and the reasons have little to do with distrust of the courts. The reason why a more detailed AUMF is only conceivable in the University of Chicago Roundtable, as opposed to the halls of Congress, is that Congress will never be able, as a practical matter, to legislate with the necessary prospectivity. It did not foresee the National Security Agency (NSA) program or military commissions in the 2001 AUMF, and it is unlikely to be able to foresee the next round of programs either. (Recall that the executive branch has repeatedly justified its failure to inform Congress of the NSA program on the ground that even debate about the program would reveal details of our intelligence activities that Congress and our enemies do not currently know.)<sup>177</sup>

In the real world, it is far easier for Congress to do nothing than to do something. And doing nothing is going to be the ultimate result if Congress has to fear that every time it does something it has to anticipate every possible claim of authorization for practices that would otherwise violate the law. It is also difficult to know what to make of claims like Posner and Sunstein's hypothetical revised AUMF, as such claims contradict a key tenet of their piece, that "the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively; the other branches cannot."<sup>178</sup> If the upshot of their proposal truly is, as they claim, to further *restrict* what the President may do, then it would seem to be in deep tension with their view of what promotes national security. It would follow that, just on their terms alone, their proposal would be a bad idea because it would lead Congress to shackle the executive although the executive has structural superiority in waging war.

There is one final problem with this approach, which is that it contradicts what the authors themselves describe as "the premise of [their] argument, taken from *Chevron* . . . that Congress must delegate its powers because it does not have the time and resources to regulate."<sup>179</sup> (For the record, we severely doubt that the decisions in the war on terror that implicate the executive-constraining zone are ones that can be analogized to garden-variety EPA disputes, not simply because "time and resources" can obviously be

---

177. Letter from William E. Moschella, Assistant Attorney Gen., to Senator Arlen Specter, Chairman, Comm. on the Judiciary 3 (Feb. 3, 2006), <http://www.usdoj.gov/ag/readingroom/surveillance17.pdf> ("[W]e were advised by members of Congress that it would be difficult, if not impossible to pass such legislation without revealing the nature of the program and the nature of certain intelligence capabilities. That disclosure would likely have harmed our national security, and that was an unacceptable risk we were not prepared to take.").

178. Posner & Sunstein, *supra* note 1, at 1202.

179. *Id.* at 1216.

devoted to the war on terror but also because the executive has claims of inherent authority over war powers that themselves act as a disincentive for Congress to legislate.) If that is the premise of their argument, it is baffling to see, as their response to the withering of Congress's role, a claim that somehow they would be energizing Congress. Either Congress is going to be a player or it is not. Our view is that the best way to encourage Congress to be a player is (1) to make sure that Congress does not have to fear that every authorization of force becomes a license for the executive to do whatever it wants, and (2) to make sure that the veto does not become a tool to entrench erroneous interpretations of law that favor the President.

#### *E. One Precondition to Deference: Bureaucratic Expertise*

Finally, even if some sort of deference to the executive is appropriate, a precondition for deference should be the use of internal executive processes that permit balanced decision-making. Recall once again that the executive's claim to legitimacy stems in part from its expertise. Apart from the Article III judiciary, the only other viable actor in our government with a long-term view is the bureaucracy.

Posner and Sunstein, however, want to permit *Chevron* deference even if no formal procedure and no channels triggering *Chevron* are involved.<sup>180</sup> As one of us has argued elsewhere, separation of powers should be moving toward a model that encourages checks and balances *within* the executive branch.<sup>181</sup> Different bureaucratic agencies have the potential to provide these checks—for example, the State Department can check the Defense Department and vice versa. Because each agency has a different core mission, agencies will tend to bring different perspectives to bear on solving a problem. These perspectives emerge even when the very same players shift employment from one agency to another—so that Colin Powell as head of the Joint Chiefs of Staff may articulate a different position than he does while serving as Secretary of State.

For those checks to work best, vibrant civil service protections are often necessary so that employees feel they can do their jobs without reprisal. Agencies might consider borrowing here from the foreign service, in which longstanding policies create the conditions for a bureaucracy that is, comparatively speaking, focused on long-term horizons. Indeed, the State Department has explicit procedures in place that permit foreign service officers to dissent and warn Washington of actions they consider to be problematic in

---

<sup>180</sup>. *Id.* at 1198.

<sup>181</sup>. See Katyal, *supra* note 53.

the field. The Foreign Service Officer who uses this “dissent channel” in the most productive way each year wins an award.<sup>182</sup>

When agencies adopt procedures like those present in the State Department, the case for deference to decisions that emerge from such processes becomes much stronger. But when claims of a “unitary executive” become so strong that they permit a President to compress or eliminate agency processes through political influence, and to bypass interagency debate altogether, deference is not being awarded on the basis of expertise. In this respect, the growth of Schedule C appointees, and the politicization of the bureaucracy more generally,<sup>183</sup> poses a long-term challenge to *Chevron* deference. To the extent such deference is rooted in expertise and not in executive accountability, its underpinnings grow increasingly flaccid.<sup>184</sup>

Yet much of Posner and Sunstein’s claim is built on considerations of presidential “expertise.” To be sure, the President has a State Department, a Defense Department, law-of-war experts, and the Judge Advocates General at his disposal, but each of these entities can be cut out under streamlined presidential decision-making. One way of viewing our point is to say that when Congress is “delegating” interpretive power to the President, it is doing so under the assumption that the President will use existing channels and procedures. If the President truncates them, however, the arguments in favor of *Chevron* deference are weakened significantly. Bureaucracy functions as a check on the tendency of presidents to act in their short-term interest, by creating a cadre of officers who adopt a long-term perspective. But Posner and Sunstein would give the President the power to short-circuit all of these institutions and to then reap the benefit by seeking deference in court challenges to his decision.

For this reason, if deference to presidential decision-making in this area is important for policy reasons, the authors should first develop procedures to improve that decision-making process. Such deference may be appropriate when the internal process of decision-making functionally replicates the divided government that our Founders expected when they separated the branches, but not in the absence of such processes. In this respect, courts could jump-start the process of creating internal checks and balances by saying that *Chevron* deference in nonemergency situations would be available in this area *only* when standard interagency processes were used.

---

182. *Id.* at 2328-29.

183. *Id.* at 2322.

184. Such changes in government make the executive more accountable, but not vis-à-vis the legislature. Accountability in the foreign affairs context, in any event, is not as significant a factor. See *supra* note 58 and accompanying text.

To make the discussion more concrete, for example, one might view *Hamdan* as an anti-*Chevron* case. On this view, the Justices consciously refused to award deference to the presidential determinations at issue because those determinations bypassed existing institutions.<sup>185</sup> With a bureaucracy that had been ignored (Secretary of State Colin Powell and National Security Adviser Condoleezza Rice were both cut out of the military commission plan),<sup>186</sup> the Court was not really being asked to defer to a plan drafted or endorsed by experts. In this respect, *Hamdan*'s failure to invoke *Chevron* is not "puzzling" at all.<sup>187</sup> The Court recognized that such deference is appropriate, at best, when the decisions are actually being made by experts. To be sure, the President has accountability advantages (and comparative expertise advantages vis-à-vis the judiciary), but he does not possess those same advantages over Congress. In a case such as *Hamdan*, in which the claims pit the powers of Congress against those of the President, deference to the latter can be appropriate, at most, only when the executive can present the argument as the product of deliberative and sober bureaucratic decision-making. There may be a number of ways to create that deliberative process, ranging from an interagency process with bureaucratic overlap that intentionally creates friction to notice-and-comment procedures. But in nonemergency situations, if snap decisions are being made in ways that cut out many of the relevant actors, the case for deference should be weaker.<sup>188</sup>

---

185. For an extended version of this argument, see Neal Kumar Katyal, *Comment: Hamdan v. Rumsfeld: The Legal Academy Goes To Practice*, 120 HARV. L. REV. 65 (2006).

186. The military commission trial "plan was considered so sensitive that senior White House officials kept its final details hidden from the president's national security adviser, Condoleezza Rice, and the secretary of state, Colin L. Powell, officials said. It was so urgent, some of those involved said, that they hardly thought of consulting Congress" and the longstanding "interagency debate" process was largely ignored. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

187. Posner & Sunstein, *supra* note 1, at 1178.

188. Posner and Sunstein state that existing law does not consider internal procedures a precondition for deference. *See id.* at 1213-14. Their only citation here is to a case that they acknowledge cuts the other way, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). We understand, of course, that existing law does not generally peer deeply into administrative processes, though there are exceptions. *See supra* notes 60-75 and accompanying text. Of course, courts may be using subterfuge to peer into these processes without actually saying so—a strategy that has significant advantages. *See Katyal, supra* note 185, at 112 ("Such a rationale might be difficult for the Justices to embrace any more openly . . . . Brazenly advocating for a different executive branch process could potentially undermine the legitimacy of the Court . . . . Any second-guessing of the Executive could take place, if at all, only between the lines of a judicial opinion . . . ." (citing GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 21-28 (1978))).

If courts were explicit about such reasoning, it would further Posner and Sunstein's goals tremendously. Then deference could be awarded on the basis of a well-reasoned and debated policy decision that was the product of a variety of different actors, some of whom have a long-term perspective. Without such a process in place, however, deference can become a doctrine to permit presidents to be awarded for their short-term, politically motivated decisions when these decisions do not redound to the long-term interests of the United States. And that sad result is something that the federal court system—the only other entity structurally focused on the long term—cannot stomach. So it is not at all surprising that courts are policing the nation's interests to make sure that such decisions are the product of both democratic deliberation and careful reflection by experts. The executive branch has sometimes leaned on rather specious accountability arguments when it has gone around its experts in the bureaucracy. In response, courts should strike a counterbalance by weighing the role of Congress, a branch with unquestionable democratic accountability, as well as cast its doctrine to ensure that the executive at least hears the views of bureaucratic experts.

## CONCLUSION

Whatever the propriety of existing canons of judicial deference to the executive in foreign relations, we maintain that the scope of this deference should not increase. The real purchase of calls for *increased* deference in this domain, such as the Posner and Sunstein proposal, is that they invite deference to the executive's interpretation of—and even the executive's decision to *breach*—law designed to condition the exercise of its own powers. In our view, substantial deference to the executive is singularly inappropriate in a large swath of cases eligible for *Chevron* deference under Posner and Sunstein's proposal: namely, foreign relations law that operates in the executive-constraining zone. Courts have scrutinized, and should continue to scrutinize, executive interpretation of international law that has the status of supreme federal law; that is made, at least in part, outside the executive; and that conditions the exercise of executive power. Failure to do so dramatically increases the power of the President in ways that would be contrary to the nation's interests and discourages the executive from developing important

---

In any event, whether existing law does in fact consider internal procedures in a garden-variety EPA challenge is irrelevant to our claim, which is that when courts are considering law in the executive-constraining zone, the risk of self-dealing requires heightened sensitivity to methods that check and divide power. Internal separation of powers, of course, is one mechanism to do that.

internal checks on presidential power. It also leads to far less congressional regulation of the executive. In short, substantial deference to the executive in this domain undermines the capacity of all three branches to promote the development of an effective, principled foreign relations law.